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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 144

T. EUGENE THOMPSON,
PETITIONER,

v.

STATE OF MINNESOTA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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T. Eugene Thompson, petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota which was entered on January 19, 1966. The time for filing this petition was extended to May 17, 1966, by Mr. Justice White, by an appropriate Order entered in this Court on March 25, 1966.

Citations to Opinions Below

The opinion of the Supreme Court of Minnesota is reported at 139 N.W. 2d 490, and is set forth in our appendix, pp. 1a-48a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., s. 1257 (3).

Questions Presented

1. Did Minnesota deprive petitioner of his constitutional right to a fair trial by submitting his cause to a community envenomed by massive and prejudicial pretrial publicity?
2. Did Minnesota deprive petitioner of his right to fundamentally fair procedure by using pure hearsay to convict him?
3. Did Minnesota violate petitioner's constitutional rights by denying him a new trial in the face of newly discovered and substantial exculpatory evidence which had been concealed and withheld by the prosecution?

Constitutional Provisions

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

On June 25, 1963, petitioner was indicted by the Grand Jury of Ramsey County, Minnesota, for murder in the first degree. On September 13, 1963, the Supreme Court of Minnesota granted a writ of mandamus transferring the venue from Ramsey County (St. Paul) to Hennepin County (Minneapolis); *State* v. *Thompson*, 266 Minn. 385, 123 N.W. 2d 378, see appendix to this petition, pp. 49a-53a.

The trial commenced on October 28, 1963 before Fosseen, J., in the District Court of Hennepin County. On December 6, 1963, the jury returned a verdict of guilty. Petitioner was immediately sentenced to imprisonment for life. A motion for new trial was denied on December 16, 1963, and a supplemental motion for new trial was denied on December 20, 1963.

On December 20, 1963, petitioner appealed to the Minnesota Supreme Court all adverse judgments of the Hennepin District Court; but on August 4, 1964, the Supreme Court remanded the case to the District Court for consideration of Thompson's third motion for new trial alleging newly-discovered evidence. This motion was denied October 8, 1964, and on October 20, 1964, petitioner appealed. The appeals were consolidated on October 27, 1964. On January 18, 1966, the Minnesota Supreme Court affirmed all District Court Judgments.

Statement of Facts

On March 6, 1963, Richard W. C. Anderson invaded the home of Attorney T. Eugene Thompson and brutally murdered his wife, Carol. Anderson struck her at the base of the skull with a rubber hose, beat her about the head with a Luger pistol, and stabbed her repeatedly with a paring knife until the blade broke off in her throat. (R. 1437)

At the time of her death, Carol Thompson was insured for $1,061,000; her husband, petitioner, was the beneficiary. App. p. 48a). Petitioner carried on his own life $460,000.00; Carol stood to inherit about $500,000. from her wealthy father, Otto Swoboda, except that if she were to predecease her father, Swoboda's estate would pass directly to her children. (R. 226). Therefore, if either Eugene or Carol Thompson were to die, the surviving spouse would have one million dollars under the insurance plan described.

The Thompsons owned a dachshund dog named "Schatzie" which was never housebroken, and used to stain the carpeting in the Thompson home to the point where it was irreparably damaged. In the fall of 1962, new carpeting was ordered; this was installed on January 23, 1963. (R. 700) On the following day Thompson took the dog to an animal hospital so that a new home could be found for it. (R. 680) Thompson and his wife agreed, after discussion with the decorator, that Schatzie had to go in order to prevent the ruin of the new rug. Carol was very attached to the dog, but understood that it could not remain in the home. (R. 686, 1950)

There were ordinarily two telephones in the Thompson home: One was a wall telephone located in the kitchen near the living room door, and this was equipped with a long extension cord. (R. 1381) The other was a portable phone, which could be plugged into any of three "jack" re-

ceptacles, two of which were located on the second floor, and one in the basement. (R. 667, 1381) Several days before the murder, Thompson removed the portable phone in order to take it to the telephone company offices to exchange it for a "Princess" type instrument; this was to be an anniversary present to his wife. (R. 1692) Several days after the murder, the exchange was completed.

Petitioner, not unlike large numbers of married males in the world, had prior to the murder been engaged in an affair with one Jacqueline (Okoneski) Oleson; the relationship began in 1960 when Thompson represented Jacqueline in a divorce action, and continued through December, 1961 with dinner dates and motel trysts. (R. 747) At that time Jackie began dating Ronald Oleson, and January, 1962, ceased working in petitioner's law office, where she had been employed for a short time as a secretary. (R. 762) In February, 1962, Jackie had some talk with the petitioner wherein she disclosed an inclination to marry Oleson; Thompson asked whether she would give him a year or 11 months to straighten out his financial affairs and arrange for his family's security. (R. 768) Jackie refused, married Oleson in June, 1962, then consulted Thompson about a divorce from Oleson a month or so later. (R. 732) During a conversation in the summer of 1962, petitioner asked Jackie whether she would marry him if he put $10,000.00 in the bank in her name, but she refused. (R. 735) Thompson commenced a divorce action against Ronald Oleson in September, 1962; in October, 1962, Thompson heard that Ronald and Jackie were talking reconciliation, and contacted a mutual friend to ask that Jackie be discouraged from taking such a step. (R. 2325) However, the Olesons did reconcile in November, 1962. (R. 2327) In December, shortly after Christmas, petitioner called Jackie at work and asked her if she would care to take an apartment in a building which he owned; Jackie declined, and did not hear

from Thompson again. (R. 728) She testified that Thompson always spoke fondly of his wife, and that she (Jackie) was personally convinced that he would never leave Carol. (R. 787) There was no evidence of marital discord between Mr. and Mrs. Thompson at the time she was slain, but to the contrary.

In July, 1962, a man named Norman Mastrian asked Thompson to represent him in a false arrest suit against certain officials in Anoka County, Minnesota. (R. 1008) Thompson demanded a fee of $2,500.00, and Mastrian offered him 1,000 shares in a corporation called Telostat as fair value for the fee. Thompson accepted, but Telostat would not trasnfer the shares under those circumstances. (R. 2027) Thompson therefore bought the shares for $2,500.00, then took the $2,500.00 back from Mastrian as a retainer in the Anoka case. (R. 959) Petitioner thereafter became interested in acquiring additional Telostat stock, and bought 2,200 additional shares from Mastrian for $2,750.00. (R. 2031) Thompson later sold all 3,200 shares to one Clark Johnson for $800.00. (R. 954) The loss suffered thereby was parallelled by a similar transaction of the E. F. Johnson Co.—the well-known manufacturer of citizen's band radios—which had bought a large bloc of Telostat stock at Thompson's price ($1.25 per share) and sold the stock to the same Clark Johnson at the same time (December, 1962) for the same price ($0.25 per share). (R. 962) From July, 1962, when Thompson first met Mastrian *(after* all of the afore-mentioned insurance was purchased), until March, 1963, when Carol was murdered, Thompson handled several matters for Mastrian and they had several meetings at various times and places. After the murder, Mastrian sought other counsel. (R. 1150) An attorney named John Connolly called Thompson on March 20, 1963, and asked him to turn over all files pertaining to Mastrian's cases. Thompson did, and also returned the

$2,500.00 retainer which he had been paid; he gave the money to Connolly, who gave it to Mastrian. (R. 1874, 1882)

We pause in this recitation of the facts to bring the attention of the Court to a critical point. The circumstances set forth above have been found sufficient by Minnesota to establish prima facie that Norman Mastrian conspired with Thompson to murder Thompson's wife, and that Mastrian hired Richard W. C. Anderson to do the job. Only because of this ruling was Minnesota allowed to bring before petitioner's trial jury Mastrian's declarations allegedly made to Anderson and others not in the presence of petitioner. Mastrian has not uttered a word relevant to this case at any time, and upon this conspiracy theory the conviction—and the admissibility of the evidence which was used to secure it—wholly rests.

Certain physical evidence found by investigators dispatched to the scene is relevant to issues presented to this Court.

When Carol Thompson came to the front door of a neighbor's home, dying, she was dressed only in a terry cloth robe which was belted. (R. 1407) Her head was matted with blood to the point where she was nearly unrecognizable. (R. 1403) She disclosed only that she had been attacked by "a man", and then was taken to the Anchor Hospital where she died despite the efforts of physicians to save her. The cause of death was "profound irreversible shock, secondary to loss of blood, also secondary to head injury." (R. 1459) She died at 12:58 p.m. having lived for about four hours after she was attacked. She had suffered stellate lacerations of the scalp consistent with blows from a blunt instrument, as well as incised lacerations of the neck and hands, consistent with a sharp instrument. Her skull was fractured.

Investigation of the Thompson home disclosed that there

were four to five inches of water in the bathtub,[1] and blood smears on the bathroom sink. (R. 1507) A woman's nightie was found on the floor, and under the sink was a piece of rubber hose about 14 inches in length. A pillow was found on the hall floor, near the entrance to the master bedroom. (R. 1502) In the bedroom itself, a nightstand lamp and a radio were both found on. (R. 1468) The morning newspaper *and a mop*[2] were found on the bed. The nightstand drawers and several from a bureau had been pulled out, and articles (some of which showed blood) were scattered about the room. (R. 1469) Carol Thompson's eyeglasses were lying on the bed.

Also in the bedroom was a piece of white plastic. This, with other fragments found on the first floor, was later discovered to have been part of the handle of the stolen Luger pistol carried by Anderson.

A planter at the head of the stairs had been knocked over, and one of the pictures hanging on the wall adjacent to the staircase had been knocked "cockeyed." (R. 1502)

Near the front entrance to the house, two pools of blood were observed. Lying nearby were three live rounds of Luger ammunition, and another piece of white plastic which had broken away from the Luger's handle. (R. 1422) There was also the handle of the paring knife whose broken blade had been lodged in Carol's throat, and a diamond ring.

The front door had been found ajar when police first

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[1] Most unfortunately, the record does not disclose whether or not the water found in the bath tub contained soap or other evidence that it had been used; for proof that Carol had actually been taking a bath when assaulted would have completely impeached Anderson's trial story, and completely corroborated the one he later told exculpating Thompson.

[2] The presence of the mop is of special significance because it is unaccounted for by Anderson in his trial testimony; in his recantation clearing petitioner, he stated that Carol had tried to defend herself by hitting him with a dry mop. (R. vol. VIII, p. 403).

entered the home. (R. 1422) Viewed from the inside, its hinges were located on the right side; on the left, a chain-latch ran from the door to the casing, to which the keeper was affixed. (R. 1510) When the criminologists inspected the premises, it was determined that the casing was pulled away from the door in the center—but not at the top and bottom—as though someone had tried to yank or push the door open while it was secured with the chain-latch. (R. 1510)

Dick W. C. Anderson, the killer, has told two detailed and contradictory stories, both under oath. The first of these was told at trial and implicated Thompson (whom Anderson had never met or spoken with) as the purchaser of murder, and Mastrian as the broker. The second, volunteered by Anderson when the county prosecutor failed to make good on a "deal" for Anderson's plea to a lesser crime, and early release from prison, exonerated Thompson and Mastrian and explained in detail how Anderson and four other criminals, with the connivance of the police and the prosecutor, had put together the case against these two defendants.

Anderson testified at trial that on March 3, 1963, he was introduced to Norman Mastrian by a man named Richard Sharp. (R. 1713) Mastrian asked if Anderson would be interested in killing a woman for $2,000.00. (R. 1719) Anderson thought the proposition over for a few hours, and agreed, on condition that half the fee be paid in advance (R. 1720) On March 4 (a Monday), Mastrian gave Anderson $200.00 as a down payment; he also mentioned that in six months or so the woman's father (Otto Swoboda) *would also have to be killed,* and that at least one of the killings would have to look like an accident. (R. 1722)

Mastrian raised the offer on the woman's death to $4,000.00 provided Anderson made it look accidental; after

further haggling $3,000.00 was agreed upon, accidental appearance or no. (R. 1724)

According to Anderson, the plan laid out by Mastrian was this: The following morning, at 6:00 a.m., while the neighborhood was asleep, Anderson was to sneak into the basement of the Thompson home. After Thompson had left for work and the children had left for school, Anderson was to listen for the phone, which would ring at 8:25 a.m.

In order to answer the phone, Carol Thompson would have to come to the kitchen, since the other phones in the house had been removed. (R. 1723) (Anderson was not informed, he testified, that because of the long cord Carol Thompson could wander from room to room on the first floor while talking on the kitchen phone.) When the phone was answered, Anderson was to sneak up the back stairs and kill Carol. He was assured that the family dog had been removed from the house because of recent redecoration, and that the dog would therefore not be a problem. (R. 1738)

Mastrian gave Anderson a length of rubber hose, and told him to hit Carol Thompson across the back of the neck with it to inflict a wound similar to that which would be received if she had slipped and fallen on the back rim of the bath tub. (R. 1725) Thompson was to leave the tub partially filled with water—to ready the scene, apparently—and Anderson was to apply reverse artificial respiration in order to fill Carol's lungs with water.

According to Anderson, Thompson was led to believe that he, Mastrian, would do the killing and did not know that the assignment was being subcontracted. (R. 1739)

Mastrian drove by the Thompson home with Anderson several times to familiarize him with it, and went with Anderson to purchase surgical gloves. (R. 1741) At midnight on March 4, Mastrian called Anderson to say that

everything was set, and to execute the plan the following morning. (R. 1742) However, at 4:00 a.m. Anderson (who had had several drinks a few hours before) decided that he would not do the job. When Mastrian called at 9:30 a.m. on March 5, Anderson told him that the job had not been done and that he, Anderson, wanted a gun in case anything went wrong. At noon on that day Mastrian, with one Henry Butler, delivered the Luger pistol to Anderson. (R. 1744-48)

On March 6, Anderson arose at 5:00 a.m., took some drugs and liquor, and drove to petitioner's residence. He entered the home, hid in the basement, and later heard people moving about upstairs. He heard the side door on the first floor open and close on two occasions, heard noises in the kitchen, and then heard footsteps climbing the stairs.

The telephone rang at about 8:30 a.m. (R. 1756) It was answered, and there were about three minutes of conversation; however, Anderson did not follow the alleged "plan" and go up the cellar stairs to attack Carol Thompson because the stairs "squeaked."

After Carol had gone back to the second floor, Anderson went after her and found her in the master bedroom, reading. The radio and the nightstand light were on. (R. 1758-60) When she saw him, he instructed her to lie face down and asked her where her money was kept; she indicated the dresser. (R. 1760) While she was lying face down, he took his piece of hose in both hands and hit her as hard as he could at the base of the skull. (R. 1761) He then disrobed her and carried her into the bathroom. He dropped the nightgown on the floor, and the rubber hose as well. He placed Carol in the bathtub (which he said already had water in it) and pushed her head under. (R. 1762)

Anderson claimed that Mrs. Thompson regained consciousness and somehow overpowered him (just how this was accomplished is mysteriously obscure on the record),

then ran back to the bedroom and put on her robe. While she pleaded with Anderson to desist, he took a pillow and tried to shoot her with the Luger, through the body of the pillow. The gun misfired. As Carol tried to escape, Anderson knocked her down, then tried to eject the cartridge in the chamber of the Luger and inject another. (R. 1763-65)

Somehow still ambulatory, Carol Thompson got up and ran down the stairs to the first floor. She took off her diamond ring and offered it to Anderson. He dropped the ring and struck Carol several times with the Luger. He then stepped into the kitchen, examined a butcher knife momentarily, then discarded it in favor of a paring knife, and with this latter weapon went back to where Mrs. Thompson was (apparently, with inestimable courtesy, patiently awaiting his return) standing, and stabbed her in the throat until the knife blade broke off. (R. 1765-69)

Anderson ran back to the second floor and pulled drawers out of bureaus to "simulate" a robbery, then went into the bathroom to wash up. *He heard a door slam.* Mrs. Thompson was gone, and the side door was part open. Anderson left by the front door, and drove back to his apartment. (R. 1769-72)

Mastrian called him at 9:30 a.m., and half an hour later they took a ride together and disposed of the gun and Anderson's blood clothing. *Present at the time was one Sheldon Morris.* On March 15, 1963, Morris met Anderson and gave him $800.00 on account. On April 15, he received another $1300.00. He thereafter went to Phoenix, where he was arrested. (R. 1774-91)

We note at this point that in this version of his handiwork, Anderson did not at any time account for the *mop* which was found lying on Carol's bed.

Thompson was convicted in December, 1963; Mastrian (whose trial was moved to Duluth, Minnesota) was tried and convicted in the spring of 1964. Thereafter Thompson,

Mastrian and Anderson were confined to Stillwater Prison. Anderson had pled guilty to murder in the first degree.

After the Mastrian trial was completed, Stillwater Officials discovered that Anderson had begun to compose a letter to the Governor of Minnesota, and to the Chief Justice of its Supreme Court. The text of the letter completely exonerated both petitioner and Mastrian from complicity in the death of Carol Thompson. As a result of this find, Anderson was interviewed on July 8, 1964, by C. Paul Jones, petitioner's appellate counsel. The story Anderson then told is contained in the record now before this Court, and is as follows.

It is to be remembered that Anderson was in the Minneapolis-St. Paul area for more than five weeks after the murder, and had opportunity to follow the police moves through helpful information provided in meticulous detail through the news media. (R. 371) Anderson learned that Mrs. Thompson was heavily insured, and that there was some conflict between Thompson and the authorities. (R. 371) Anderson discerned that officials did not seem to be concerned with how or why the murder occurred but only what had been paid for it. (R. 371)

Anderson knew that Richard Sharp, Willard Ingram and Henry Butler were aware that he had been planning to burglarize the Thompson residence (a fact which he vehemently denied at trial), and so when the papers began to give the details of Carol's death Anderson met with these other three (who will be better described below) and told them that he had committed the murder for money. (R. 372) Anderson had worked with these men before on burglaries, and had been a burglar himself since 1953 (R. 417), another fact which he unequivocally denied at trial.

He stated that the break at the Thompson home was suggested by Sheldon Morris, and that Morris was to get 25% of the "take" in exchange for the tip. (R. 417) The

fact that Morris had broken into the Thompson home on a prior occasion, and that Anderson intended to attempt a break himself, was discussed in front of Butler, Ingram and Sharp. (R. 419)

Anderson said that on March 6, 1963, he drove to the Thompson residence by himself while it was still dark, and snuck into the basement of the home. (R. 367) He heard Thompson and the children leave. He was wearing a handkerchief as a mask, and because he had learned (presumably from Morris, whose break had occurred in December, 1962, while Schatzie was still in residence) that there was a dog in the home, Anderson carried with him a length of rubber hose "for the purpose of knocking the dog out and then if I had trouble with Mrs. Thompson to tell me where the money was I thought I might whack her a couple of times." (R. 367). Anderson had found this hose in the basement of his own apartment building, in a laundry or storage room, at 2870 Humboldt Avenue South in Minneapolis. (R. 368) Because it was too long, he trimmed it to a suitable size and threw the excess into the incinerator. Anderson waited in the Thompson basement, uncertain as to whether anyone other than Mrs. Thompson remained in the home, until 8:30 a.m.; at that point he heard the telephone ring, heard Carol come downstairs and talk on the telephone, but did not hear her converse with any other person present in the house. (R. 401). He was then sure that she was alone.

Anderson went up to the second floor, and found Carol in the bathroom just about ready to climb into the tub. (R. 402) She might have just gotten out of the tub, because she was wet and her hair was wet—and right away she screamed. Anderson had the handkerchief over his face and:

> "... she screamed and started to holler, that's when I hit her with the hose and I knocked her out, and so I

took her from the bath room into the bedroom and laid her down and I started going, she was still out, so I started going through the dresser drawers and everything and I found only $125 in the drawer, and when she came to she got up and started screaming again, and she grabbed a mop and starting to hit at me and so I hit her again, but this time with the gun and at the time, I don't know she was fighting me, and I must have lost my head and I started, went crazy or something, because I started to hit her real hard with the gun butt and she started to bleed. She went down and she got up and she got tired running and she ran downstairs and I caught her at the door and if I hadn't have locked the night latch on the front door when I had come up from the basement, the chain lock on it, she would have gotten out. I hit her again down there a few times. I don't know how many times, and she went out again, and I don't know why, but I went to the kitchen and got the knife and knew she was suffering and I thought I could put her out of her misery, I guess, I don't know, but anyway I killed her or thought I had, and when she had been out before I had taken the ring off from her and then in the scramble downstairs I had dropped it, and I had tried the gun downstairs and it wouldn't work, and then I went upstairs to wash up and that's when I heard the door slam downstairs, and I ran down to see what it was all about and she was gone and that's when I went out the front door.

Q. You went out the front door?

A. Yes.

Q. Was the front door unlatched at the time that you went out?

A. No. I had to unlatch it.

Q. Was it hooked at the time that you went out, the

night latch on the door or whatever you call it, night chain?

A. I had put it on when I come up from the basement so in case anybody came I thought they would probably come by the front door and that they wouldn't come in.

Q. What about the back door, did you do anything about the back door?

A. No. I had forgotten to lock that on the way up.

Q. How was Mrs. Thompson dressed when you first saw her in the bath room?

A. Her hair was wet and she had her robe on.

Q. She had a robe on?

A. Yes.

Q. Do you recall seeing a night gown at all?

A. I think there was one in the bath room but I am not sure. Things started to happen pretty fast.

Q. Did you ever try to drown Mrs. Thompson or put her in the bath tub?

A. No.

Q. Was she ever in the bathtub at the time that you were in the house?

A. No. Not when I was in the house she wasn't.

Q. I mean while you were there with her is what I obviously mean?

A. No.

Q. So you didn't put her in the bathroom, you didn't find her in the bathroom?

A. No.

Q. You never took her out of the bathtub, not the bathroom, I mean?

A. No. She was already up with her robe on.

Q. Where did you get the gun that you used?

A. I bought it from Mr. Sharp about a week or two prior to the murder.

Q. Where did Sharp get it?

A. He said in a burglary.

Q. How much did you pay for it?

A. $50.

Q. Did you hear Mr. Thompson or what you thought was Mr. Thompson say anything before he left the house?

A. I just heard his voice. I couldn't make out.

Q. Did you ever hear him make a statement to the effect that he didn't have time for coffee?

A. No.

Q. Why did you testify to that statement being made at these trials?

A. Well, I thought it would make it more look like he was in a hurry to get down there to make a telephone call back to the house.

Q. You dreamed this up yourself then?

A. Pardon?

Q. You thought this up yourself?

A. Yes.

Q. Is that right?

A. Yes.

Q. Where did you get the story about reverse artificial respiration deal?

A. It is common knowledge, take all the air out and push the air out why the water is going to come in.

Q. What kind of mop was she using in the bedroom that she was fighting with?

A. I think it was a dust mop. I am not sure.

Q. Do you know whether or not you dropped any bullets out of the gun while you were upstairs?

A. I don't know if I did or not. It could have been downstairs or it could have been upstairs.

Q. Did you strike her with the gun upstairs or try to strike her with the gun upstairs?

A. Yes. I struck her with the gun upstairs.

Q. Did you try to shoot the gun upstairs when you were fighting with her?

A. I don't believe I did first. I don't know. My mind snapped. I didn't know what I was doing.

Q. It's possible that you tried to fire the gun upstairs?

A. Could have been.

Q. But you know definitely that you tried to fire the gun downstairs, is that right?

A. Yes.

Q. Did you know anything about the telephone situation in the Thompson house prior to the time that you actually entered the house?

A. No." (R. 402-407)

The plan to frame Thompson (and incidentally Mastrian), Anderson explained, was conceived as follows: Anderson was fearful that Butler, Ingram or Sharp might implicate him in what, although it had been intended only as a burglary, had resulted in homicide, principally because they knew that he had decided on the Thompson home as a target and was probably the one who had been there on March 6 (R. 371). He therefore told them that the killing had been "on contract."

Anderson had read and heard a good deal about the evidence uncovered by the authorities prior to his arrest, and when he was picked up in Phoenix with Sharp, the two of them had a chance to discuss the matter (R. 372). Anderson knew that Butler and Ingram had been arrested for a "stick-up" and were already in custody in St. Paul; he also knew that Morris and Mastrian had been arrested in connection with the Thompson murder. (R. 373) Anderson instructed Sharp to converse with Butler, Ingram and Morris when Sharp got back to St. Paul, and give them

Anderson's story about the killing for hire; this Sharp was able to do because St. Paul authorities, conveniently, lodged him in the same cell with Butler, Ingram and Morris. (R. 373)

Anderson then called a Phoenix attorney named Marvin Johnson, and told him that he had killed Mrs. Thompson for money; Anderson suggested that Johnson fly up to St. Paul and demand money from Thompson for Anderson's defense. Anderson felt secure in the knowledge that the homicide was not in fact premeditated but the unintended result of a burglary, and that if he could secure representation by expert counsel he would avoid conviction of murder in the first degree. Marvin Johnson did go to St. Paul, but returned and told Anderson that Thompson had rejected his demand out of hand. (R. 373) Anderson therefore signed extradition papers, and returned to St. Paul voluntarily; at the same time, he began hinting to police interrogators that the death of Mrs. Thompson was a paid affair.

When Anderson was in the St. Paul jail he was questioned from time to time, and on the night before the grand jury was to meet to consider his case, he was called over to the office of County Attorney William B. Randall. Randall explained to him that he could testify before the grand jury if he chose to or could remain silent; he also explained the differences in first, second and third degree murder. Anderson went back to his cell. (R. 374)

Thereafter Marvin Johnson again flew up from Phoenix, and again attempted to squeeze money from Thompson—but with no success. Johnson then talked with Randall, and thereafter informed Anderson that he might make a "deal" if he cooperated. Johnson then left the case for lack of money. (R. 375) Anderson was assigned a public defender named Tom Moore.

On the day Anderson was arraigned, while he was wait-

ing in the "bull pen" prior to going into court, Sheldon Morris was suddenly put in with him. Morris filled Anderson in on the statements that he (Morris) had been making to authorities. That afternoon Lt. George Barkley of the St. Paul Police Department (one of the principals in the investigation) came to see Anderson in his cell. (R. 376) He said that Morris would like to talk with Anderson. Anderson agreed. Morris and Anderson were placed in the Grand Jury room together on the afternoon of June 19, 1963 and Morris told Anderson that if Anderson cooperated by implicating Thompson and Mastrian, Anderson could plead to second degree murder and Randall would get him out in five years or so. They talked for an hour and a half to get their stories straight. Morris told Anderson that he, Sharp, Ingram and Butler had one whole cell block to themselves, and they had TV, and that they had "the run of the place."

On the way back to the jail, Lt. Barkley asked Anderson if he had anything to say concerning the murder; Anderson replied that he wanted to see counsel before deciding.

The following day Anderson spoke with Moore, and Moore suggested that the deal be confirmed by Randall before Anderson talked. A meeting was held, but Randall would not ratify the representations of Morris, so Moore advised Anderson to say nothing. (R. 377) Anderson went back to jail, ate supper, and then was called out to talk to Detectives McMullin, Phillips and Barkley. These officers pretended to be angry with Randall for refusing to confirm the "deal"; they were very anxious to get Anderson's statement so they could "pinch" Thompson.

Anderson then agreed to talk to Randall *without* counsel being present, and was taken to the Sheriff's office. Randall and Anderson went into a room and conferred privately; Randall told Anderson that: (R. 378)

On several past occasions, murderers (which he named)

had gotten off with very little or no prison time by cooperating with authorities; that the Parole Board had no jurisdiction over first degree murderers, and that any relief would have to come from the Pardon Board composed of the Chief Justice, the Attorney-General and the Governor. Randall said that in 1966 he was going to run for Governor or Attorney-General,[3] and that when he had been elected he would be in a position to help Anderson, personally and through influence.

Anderson gave him a brief story implicating Thompson. Randall pointed out that Thompson's father-in-law, Otto Swoboda, was a wealthy man and that Randall did not want his affluence or influence backing Thompson in the coming legal battle. *Randall suggested*[4] that (R. 379) Anderson say that Otto was also scheduled to be killed at Thompson's behest, thus alienating Otto's support.

Randall confirmed the representations made to Anderson by Morris the previous day, and told Anderson that if he cooperated he would be allowed to plead to second degree murder, and that he would serve no more that five years at the very most. (R. 385) Anderson agreed to go along with the plan, and thereafter (without further advice of counsel) gave a statement to the police officers.

At a subsequent conversation with Randall, Anderson was queried as to what sort of criminal record he had. (R. 388) Anderson said none, and Randall said that this was good, because it would make it easier politically to get Anderson "loose"; Randall said that he was going to have

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[3] This representation by Randall to Anderson—which Randall has never denied—is borne out by Randall's announced gubernatorial aspirations at the present time; and it appears that as a candidate he is chiefly noted for having convicted T. Eugene Thompson. (App. p. 92a)

[4] This tactic—which stands as uncontradicted evidence on the record—must be the lowest trick ever pulled by an American prosecutor. In and of itself it warrants voiding this conviction.

a thorough investigation made of Anderson's background, in order to have grounds for Anderson's early release. Anderson later found that this investigation, made between July and October, 1963, was paid for by the insurance companies who were interested in defeating Thompson's claims on his wife's policies. Anderson read the report, consisting of 57 pages, which related his background in Michigan.

After the Thompson trial Randall bought and paid for a pair of shoes for Anderson; these were fitted in the County Jail, and cost $21.50.

Two months after the Mastrian trial was over, Randall called Anderson into his office. They had sweet rolls and coffee, as usual. Randall related that he had talked with "all the judges" and none of them would be a party to a plea to second-degree murder by Anderson. (R. 390) Randall described the trouble caused by the extreme leniency accorded the other alleged conspirators—Morris, Sharp, Ingram and Butler—and stated that he wanted Anderson to plead guilty to murder in the first-degree "to stop all this in the appeals."

Randall said that if Anderson would cooperate to this extent, that as of 1966 Randall would be either Governor or Attorney-General of Minnesota, and that within 6 to 8 years Anderson would be pardoned. Randall pointed out that in a recent survey it had been determined that one out of every ten people knew his name; that he had no doubts about being elected, since the Thompson case had "put him over" because his name had been in the paper practically every day. He said that if Anderson would go along with a first-degree plea, that Randall would see to it that Anderson got a full pardon, not a commuted sentence, and that he would go scot-free. (R. 391) Anderson pleaded.

Anderson said that as a result of these circumstances, he had written the letter to the Governor and Chief Justice

exonerating Thompson and Mastrian; that it had not been suggested to him, and that he had done it on his own to clear his conscience, and because it was the truth. He said that he had been given no promises by anyone as an inducement to write the letter, and that he had not been subjected to any threats. He had not talked with Thompson or Mastrian at any time in the prison.

He did say that after the letter had been found, on July 5, 1964, he began a second letter. (Tr. 361) This was taken from him on July 6. The following day he was brought to the Associate Warden's office and confronted by Randall and one Lt. Benson. He stated that he did not wish to discuss the matter. He was ordered to sit down, and he kept insisting that the truth about the Thompson case had to come out. Randall asked if Anderson felt that he had been double-crossed in some way, and Anderson repeated that he wanted to tell the truth. (R. 362) Anderson got up to leave, and as he opened the door Randall said:

> "Are you in your menopause or are you having your change of life or something?"

Anderson said that he feared harrassment by law enforcement authorities, and wondered if some injunction against them could be obtained. (R. 393)

Anderson also related how, when in the course of the Mastrian trial there appeared some evidence giving Mastrian an alibi for a time critical to Anderson's trial recitation, the prosecution became concerned. (R. 395) Anderson explained that this problem was solved by a cooperative effort between prosecution officials and Anderson, Morris, Ingram, Sharp and Butler: A girl named Margaret Johnson, school-teacher and prostitute, was prevailed upon to commit some relevant perjury and contradict Mastrian's evidence.

Shortly after making these revelations to petitioner's counsel, Anderson was conveniently whisked out of Stillwater. He was taken first to the County Jail in Minneapolis by two United States Marshals. (Just how it was that the United States came to Minnesota's aid in this instance is not disclosed by the record). Enroute to jail Anderson told the Marshals that he had *not* given his statement of July 8, 1964, as a result of threats. (R. 489) He was then removed to federal prison (whose whereabouts is, still unknown to petitioner) until motions for new trial came on for hearing in Hennepin District Court on September 15, 1964. (R. 446) This was a joint hearing covering both the Thompson and Mastrian motions; all counsel and both trial judges were in attendance.

Anderson, the only witness at the hearing, came forth with a *third* story, thus bringing full circle what must be the most audacious bit of sworn mendacity ever to purple the folios of an American trial transcript. In this already lengthy statement of facts, we can but illumine the highlights of story number three.

Anderson had sworn at trial that he was not a burglar and never had been; in the July 8th statement, he said that he had been a burglar since 1953. When he took the stand on September 15, he was immediately asked by Attorney Jones whether he had in fact committed a burglary in 1953. Anderson took the Fifth Amendment. (R. 447). Judge Fosseen ordered him to answer. He thereupon replied in the negative!

Anderson admitted writing the letter to the Governor and Chief Justice, and admitted having offered on July 8th to take a lie detector test and/or truth serum to demonstrate the truth of that exculpatory letter, but said that the letter was false and that he wished to revert to his trial story. (R. 461) He said that although he never talked with either Thompson or Mastrian at Stillwater, his letters

and subsequent statements were the result of two types of threats communicated to him. Mastrian had threatened to kill him, and Thompson had threatened to have his (Thompson's) children oppose Anderson's parole in future years (R. 461) (How this latter threat might be effectual, since he could not become eligible for parole *in his own understanding*, Anderson did not explain). Anderson was pressed to tell just who it was that conveyed the Thompson "threat" to him, and he took the Fifth Amendment again (R. 464). Judge Fosseen ordered him to answer, and this time Anderson refused (R. 466). Anderson was later asked who had communicated the Mastrian threats to him, and again refused (R. 477). On both occasions Judge Fosseen held Anderson in contempt. Just what terrible penalties were visited upon Anderson for this contempt do not show upon the record; but Thompson and Mastrian never did have the opportunity to produce named individuals, alleged conduits of threats, who could brand Anderson as a liar.

Some of the most egregious facts in the July 8 statement Anderson reaffirmed at the hearing on September 15. For instance:

(1) Anderson reaffirmed the fact of his conversations with Morris on the day of his arraignment, in the "bull pen" and in the grand jury room, as well as the deal which Morris had dangled before him—second degree murder. (R. 480)

(2) He admitted that Morris had told him prior to the Thompson trial that all four—Morris, Butler, Ingram and Sharp—were making deals which would avoid for them the inconvenience of serving time in prison. (R. 484)

(3) He affirmed his private conversation with Prosecutor Randall the night before Thompson was arrested,

but equivocated somewhat as to whether the second-degree deal was a firm promise by Randall (R. 485)

(4) He affirmed the fact that after the Mastrian trial Randall had come to him and reported that no judge would take a plea to second-edgree murder; that Anderson ought to plead guilty to first-degree murder; and that Randall expected to become either Governor or Attorney-General of Minnesota in 1966, and would use his office to secure a commutation for Anderson. (R. 496-7)

Anderson was also examined on September 15, 1964, by John W. Cochrane, Esq., counsel for Mastrian. Cochrane probed the reason for Anderson's transfer from Stillwater to the Hennepin Jail and thence to federal prison. *Anderson stated that he had not told anyone at Stillwater about threats from anyone, and at the time of his transfer did not know why it was done!* (R. 508) He further said that:

(1) He had perjured himself during the Mastrian trial when he testified that he had not met Sharp, Ingram or Butler prior to March 3, 1963. (R. 510)

(2) He reaffirmed the fact that the testimony of prostitute Margaret Johnson, used in the Mastrian trial, was procured by Sheldon Morris after a conference with Anderson, Sharp, Ingram and Butler (R. 511)

(3) He admitted that when Sheldon Morris was a trusty in the Ramsey County Jail prior to the Mastrian trial he used to eavesdrop on conversations between Mastrian and Attorney Cochrane, and that Morris was in frequent contact with Prosecutor Randall and Detectives Barkley and Phillips (R. 519)

At the conclusion of Anderson's testimony, the prosecutor offered no evidence. He did not testify, and his argument

is devoid of reference to the "deals" with Anderson, or indeed any suggestion that they were never made as described.

Morris, Butler, Ingram and Sharp all gave testimony damaging to petitioner at his trial, principally in corroboration of Anderson. Their roles are adequately described in the opinion of the court below. (App. 8a-12a) Thompson's trial counsel did not query Butler or Anderson as to whether they expected soft treatment at the hands of the prosecution in payment for their contributions to Thompson's destruction. But the other three were (all were charged with one crime or another at the time of the trial).

Morris testified that he had a trial to face; that he expected to face trial; and that no one had indicated to him that he would not. (R. 1209-10)

Sharp testified that he was awaiting trial on a burglary charge; that he was not expecting to have the charge dismissed; and that no one had ever said that it would be. (R. 1304)

Ingram testified that he expected to stand trial for attempted armed robbery. (R. 1340)

But of course none of these men ever stood trial. After Mastrian had been convicted, they were waltzed into court, one by one and released, as the Minnesota Court noted with obvious concern. (App. 45a)

Sheldon Morris pleaded guilty to accessory after the fact of (Carol Thompson's) murder, and received a suspended sentence with five years probation.

Willard Ingram pleaded guilty to attempted robbery in the first degree, and his sentence was stayed. Ingram had at least four prior convictions for felony. He was not charged under habitual offender laws. His federal parole (extant at the time of his apprehension) was *not* revoked.

Richard Sharp was charged with burglary in the third

degree; the charge was dismissed on motion of the County Prosecutor.

Henry Butler pleaded guilty to attempted robbery in the first degree; his ten-year sentence was stayed with probation.

Only poor Anderson, it seems, failed to get adequately remunerated for his services—and through no fault, apparently, of the prosecution.

We close this statement of facts with an excerpt from Prosecutor Randall's final remarks to the jury: (R. 293)

> "There has been nothing to hint or suggest that these policemen have had any reason to testify with any ulterior motive, nor has there been any evidence whatsoever that any of the witnesses have testified as a result of any persuasion or counseling or advice by our office, or by the police *** to insinuate that we go about the process of trying a case by stultifying a witness is an insinuation which I do resent . . ."

Reasons For Granting the Writ

I. Introductory Note: As is established in the foregoing statement of facts, the celebrated trial of T. Eugene Thompson is in its present posture both complex and bizarre. As the exhibits included in our appendix show, few trials in the history of this trial-loving country have commanded more comment or attention. The State of Minnesota founded its prosecution upon the naked word of some of the lowliest vermin who ever scarred the face of the earth, and did so in circumstances where the best evidence was only hearsay. Through the misconduct of its prosecuting officials, it surrended jurisdiction of the cause to the news media, and only after Thompson had been so thoroughly roasted in the community that his "peers", in

the main, were satisfied of his guilt, did Minnesota revert to the formality of a judicial proceeding.

Lacking any direct or circumstantial proof of guilt, the State invoked that most damnable instrumentality and prosecutor's delight, conspiracy, and with it proceeded to thoroughly rape the rules of evidence. Then, having married, profited by and paid its psychopathic prevaricators, it turned a deaf ear upon the one unpaid who yelped in retribution and yanked open a Pandora's box of legal sins.

We approach this most critical section of this petition with several independent federal constitutional claims which we think present "special" and "important" reasons for granting a writ. But we also submit the case for inspection *in toto*, to seriously urge that the dignity of American Jurisprudence, and the integrity which this Court has progressively brought to our system of criminal justice, fairly require that a conviction of this ilk be thumpingly condemned. Minnesota has said that it fairly showed petitioner to have arranged the cold-blooded and repulsive murder of his wife, and did so in a manner somehow thought to be within the perimeter ascribed by the due process clause of the federal constitution. We contend that Minnesota showed that in all likelihood petitioner had nothing to do with his wife's death, and that his conviction, and the chicane, connivance, subornation and purchase by which it was procured, must be recorded as one more insult to the system of jurisprudence we vouchsafe to be the finest in civilization.

II. Petitioner Was Denied a Fair Trial Due to an Envenomed Atmosphere in the Community From Which His Jury Was Drawn.

We are well aware that the great collision between our free press and the right of a citizen to a fair trial before

an impartial jury is a matter presently of great concern to the Bench and Bar generally, and to this Court. And because of time limitations, we must submit this cause without the benefit of such principles as may evolve from the forthcoming decision in *Sheppard* v. *Maxwell*, No. 490, October Term, 1965. But whatever the result, holding and dictum in that case may be, it is manifest from the record that Thompson suffered more *conscious* prejudice in the minds of his fellows than did Dr. Sheppard.

We have set forth in our appendix extracts from local newspapers which appeared in the pre-trial stages of this case. (App. 55a-73a) We have also reproduced in full an article which appeared in *The Saturday Evening Post* shortly before trial, because that magazine enjoys a large and general circulation, and because twenty-three of the talesmen interrogated on *voir dire* admitted to having read it, while five other had glanced through it or heard about it. Four people familiar with the *Post* article sat on the jury.

These reproductions are of course only a small part of what the news media had to offer in the matter, but they do disclose the basic evil of which we complain, and which we contend is responsible for Minnesota's inability to provide a fair trial: The inexcusable release by police and prosecutors of information and opinions designed to persuade the community of the defendant's guilt, far in advance of trial.

We find great difficulty in understanding what right Lt. George Barkley had to say that he knew who had planned Carol Thompson's death, and would arrest him "when our case is so overwhelmingly concrete it leaves no possible chance for acquittal in a courtroom." (App. 55a) We question the propriety of the announcement by police that with the arrest of petitioner the case was "completely solved." (App. 58a) It is similarly difficult to comprehend Prosecu-

tor Randall's decision to make public (if oblique) statement that Anderson had named Thompson as the mastermind of the killing. (App. 59a)

Then there is the matter of comment—to the news media—by both Barkley and Randall criticising Thompson for not cooperating more enthusiastically with them. (App. 64a) This served to infer Thompson's guilt from his decision not to consort with men whose announced purpose was to hang him from a tall tree.

To newsmen panting for details of the fascinating Anderson statement, branding petitioner as one of the most heinous criminals of this age, Deputy Sheriff Larry McMullen gave succor by letting slip some most damaging tidbits. (App. 67a) McMullen was reported as alleging that Thompson himself had given Anderson a map of his house, the better to find Carol with, a gruesome fact which was never suggested by the evidence. Within days of Thompson's arrest, the prosecutor's opening statement had been drummed throughout the community as fact. (App. 69a, 70a)

The *Post* article we do not seek to analyze in detail. It is sufficient to say that any average reasonable citizen reading it through could not help but conclude that Thompson was the architect of one of the century's most grisly atrocities, and had been caught by clever police, or fate, or both. In a similar vein, the *Newsweek* article of July 1, 1963, with its recitation of facts which could only have come from officials who had no business disclosing them, cannot be read without a resulting feeling that T. Eugene Thompson traded his wife's life for some insurance money. (App. 89a et seq.)

There does not seem to be much dispute that the publicity prior to trial was massive and prejudicial to petitioner. In ordering by mandamus a change of venue from

Ramsey County, the Supreme Court of Minnesota had this to say: (App. 51a)

> "Probably no case in the memory of anyone in this locality has aroused so much interest and so much discussion as this one. Over a period of several months hardly a day has elapsed when something has not been said or written in news media of one kind or another."

Then the court recited Lt. Barkley's "Big Fish" statement and several others, and ordered a transfer.

It is conceded that Thompson himself requested that the venue be set in adjacent Hennepin County. The reason for this choice is obscure and unarticulated upon the record. The Minnesota Court apparently had grave misgivings that where Ramsey County (St. Paul) was demonstrably tainted, Hennepin County (Minneapolis) would be a material improvement. (App. 53a) However, the court acceded to the defendant's wishes.

A jury was selected in Hennepin County, and the record reflects no further motion for change of venue. It does not appear, however, that the right to demand such relief was intentionally relinquished by Thompson; when his case was presented to the Minnesota Supreme Court, he was permitted to file an affidavit and *pro se* brief which stated in pertinent part (and is filed in this Court with the record):

> "When I retained Mr. Segell to represent me, as he did throughout this period of arrest indictment and conviction, I promised him at his request, to refrain from interfering with his handling of this case. I kept my promise. I did, however, during the trial make two requests of him to make motions before the trial

court. It wasn't until I read this record that I knew he did not make either motion.

The first motion I had asked him to make was for a change of venue from Hennepin County. I asked him to do this during the selection of the jury and at a time when it was apparent to me that I could not have a fair and impartial jury. At that time I advised him that, in my opinion, the trial would be merely a necessary procedure to complete in order that I may be lawfully convicted in the minds of the public, having already been convicted by the public unofficially as evident by the information elicited and the attitude of those already examined and of those actually selected. He shared my opinion but said that the court would deny such a request. I agreed that in all probability it would deny the motion but that I wanted it made in chambers, for the record, and outside the hearing of those in the courtroom. This request of him was made by me after the 10th juror had been selected but before the juror selections had been completed.

"The second motion I asked Mr. Segell to make, as so advised to him by me, for the record, in chambers, outside the hearing of the jury, was a motion for a mistrial following the assassination and death of President John F. Kennedy. He again stated that in his opinion the court would deny such a motion, I advised Mr. Segell that in all probability it would be denied but that I wanted the motion made for the record." (Thompson Pro Se Brief, pp. 20-21)

A record defect of this sort, although no doubt cognizable on habeas corpus, might present serious problems to review by certiorari if Minnesota had elected to assert the procedural default as a bar to relief. But, very much like In-

diana in *Irvin* v. *Dowd*, 359 U.S. 394, Minnesota clearly reached the merits of the constitutional question before it. In fact, the court below paid but little notice to the apparent lack of a second plea for change of venue and decided in substance that it had complied with minimum federal constitutional standards not because Thompson had been given a fair trial, but because he had been given *as* fair a trial as Minnesota could provide.

We note with emphasis that the court below did *not* indulge in a particularized examination of the transcript of the voir dire of the jury, simply because such a transcript was not available until ordered by present counsel, and completed on May 3, 1966.[5] The court below assumed *arguendo* that counsel's assertion that 67 of 112 prospective jurors expressed actual bias, and then ruled that this fact was not relevant to the probable bias of the jurors who actually sat. (App. 42a)

Such a view fails to recognize the significance of the percentage of biased jurors which a given panel may yield, and indicates *prima facie* misunderstanding of the principles laid down by this Court in *Irvin* v. *Dowd*, 366 U.S. 717. A study of that decision makes plain the fact that a determination of the fitness of a community to furnish a fair jury must be made from an analysis of the total picture which the voir dire presents. Application of that method to this case indicates, we believe, that Thompson's jury was similar in all important particulars to that which convicted Leslie Irvin.

There were in fact 112 talesmen questioned in the selec-

[5] The Minnesota Supreme Court has refused to certify this transcript of the voir dire as part of the official record, because that transcript was not filed as part of the original appeal. However, we do not feel that such refusal can properly deprive this Court of an opportunity to consider the voir dire in toto, and therefore submit it with the certified record; the transcript is certified by the official stenographer, Keith G. Scheid.

tion process. Of these, 8 were excused by the court for miscellaneous reasons such as elderliness or health, and one was challenged for cause by the prosecution because she was related to the Swoboda family. (R. 132) The *relevant* total is thus reduced to 103.

Of these, 67 expressed an opinion that Thompson was guilty, 22 were challenged peremptorily, and 14 were impanelled to hear the case.

If those peremptorily challenged are eliminated from the statistical analysis of the pool, then 67 of 81 jurors were willing to *admit* to an opinion of guilt. This means that 83% of those examined had been so influenced by published reports that they thought Thompson had killed his wife for money.

If those peremptorily challenged are to be included in the total (a proposition which can be reasonably argued both ways), then 67 of 103, or 65% were actually biased. Either percentage is, we think, too high to coexist with assumed selection of petit jurors who were in fact properly impartial.

Comparison of this case to *Irvin* v. *Dowd*, 366 U.S. 717, discloses applicable similarities. In that case 430 persons were examined; 268 were excused because of opinions of guilt. An additional 103 were excused for objection to capital punishment, 30 were challenged peremptorily, 14 were impanelled, and the balance were excused for miscellaneous reasons. 90% of those questioned on the point expressed some opinion of guilt, ranging from mere suspicion to considerable intensity.

Questions to Thompson's jurors were couched in terms of whether they had opinions which it would take evidence to remove. Some of the responses are relevant to this issue:

> "It would have to be pretty good evidence" (to remove the opinion). (Tr. 164)

"It certainly would" (take evidence to remove my opinion). (Tr. 71)

"Yes, a great deal of evidence I think." (Tr. 258)

The attitude of those admitting conscious bias must, in the light of psychological science and human experience, reflect upon those claiming impartiality. As Mr. Justice Clark so cogently put the matter in *Irvin* v. *Dowd*, 366 U.S. 717, 728:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a declaration can be given little weight."

An examination of those peremptorily challenged does little to suggest more favorable statistics. 14 said they had no opinion. 2 were not asked. 2 admitted to a slight opinion, and 1 was an insurance salesman: these were the 19 challenged by the defense. Of 3 challenged by the prosecution, 2 said they had no opinion and 1 said he wanted "lots of proof" to convict on a charge so grave as murder.

Of those who made the petit jury, 10 asserted that they had no opinion; 3 said that they had had an opinion, but had set it aside; the last, a Mrs. Banks, said: (R. 222)

> "I can't see why anybody of Mr. Thompson's ability and education could be so foolish as to commit this crime, and yet I think that the *evidence* makes me wonder why someone else did it. Does that explain what I mean?"

This statement explains all too well what Mrs. Banks meant, and what every petit juror who had read or heard about the case (all of them had) must have also thought: If Mrs. Thompson was murdered, and Mr. Thompson stood to gain a million dollars in insurance from her death, he probably ordered it. The police had missed no opportunities, in the pretrial stages of the case, to pump this notion incessantly through the news media.

There is much that the court below has said in its treatment of this issue which is commendable. Its endorsement of the New Jersey Supreme Court's view in *State* v. *Van Duyne,* 43 N.J. 369, to the effect that courts ought to deal promptly with lawyers "who publicly discuss the case and are quoted in the news media" is much to be admired, for certainly trial by newspaper could be greatly stifled by drying up the sources of information. But these pronouncements by way of dictum are of small comfort to petitioner, and will not enjoy much implementation unless those who offend in this regard are made to feel the sting of (1) reversal and (2) professional discipline. It does not appear that Prosecutor Randall, who did much talking to the press when he knew that Thompson was his target, has suffered significantly for that conduct. His precious conviction is still intact, and at least partially upon its notoriety he currently seeks higher rungs on the political ladder. (App. 92a).

No where in the Minnesota opinion do we find it confidently asserted that this petitioner actually got a trial sufficiently fair to give that court comfort in his conviction. Instead it was said that: (App. 42a)

> "It is doubtful in this case that a more fair trial could have been obtained elsewhere in this state. The same news coverage extended throughout the state as in Ramsey and Hennepin Counties. The case was

one of public interest everywhere. * * * Criminal cases *must be tried somewhere* and, having gone as far as we did in permitting the defendant to choose his own county, we do not know what more we could have done." (App. 43a)

The Minnesota Court is to be much respected for having endeavored to do its best to secure for petitioner the fairest trial available. But its conclusion overlooks an obvious question: If a state is unable to provide a trial sufficiently fair to comport with the lower limits of Due Process, must the defendant be tried anyway? Under the principle applied by the court below, Lee Harvey Oswald could have been properly convicted in the United States, however unfairly, so long as he got the best trial available. And yet every thinking criminal lawyer, professor and judge knows that, thanks to the misconduct of loud-mouthed Dallas authorities, Oswald could not have been fairly tried anywhere except after years of delay—if then.

When an entire state has been tainted by pretrial publicity, there are nonetheless two remedies available: The case can be continued for an extended period, to take advantage of the curative effect of time upon human indignance; or the case can be removed to a federal court—for the United States always has power to step in where it is apparent that state courts cannot render Due Process—and the venue be set far from the blister of inflammation. Either of these things Minnesota could have done, but did not. Until every last remedy is exhausted, there is no need to throw in the judicial towel and accede to the pervasive power of unfettered news media.

And when these preventive measures fail, either from non-use (as here) or inadequacy, it is no answer to say that a state has done its best. This is no proper test of the issue. However unattractive, tiresome or unpopular such a

move might be, there is always the ultimate remedy of reversal—and if necessary reversal again and again, until a fair trial has been had.

One wonders how many reversals would have been required had this country ever been required to face up to the case of *Oswald* v. *Texas;* forever doomed—perhaps fortunately—to be hypothetical.

III. Minnesota Violated Petitioner's Constitutional Right to a Fair Trial Through the Use of Hearsay Testimony.

The Supreme Court of Minnesota considered separately questions relating to the admissibility of certain hearsay testimony (App. 18a) and the sufficiency of the evidence to sustain the conviction (App. 43a). We consider these issues to be so intertwined as to require presentation together, for resolution of the former is determinative of the latter.

It cannot be disputed that the use of hearsay testimony *per se,* not in accord with any of the well-recognized exceptions rendering that hearsay reliable, would run so far contrary to the deeply-rooted traditions and principles of our jurisprudence that due process would be transgressed. A litigant met with hearsay is denied his right of confrontation and cross-examination as required by the Sixth and Fourteenth Amendments to the United States Constitution. *Pointer* v. *Texas,* 380 U.S. 400.

It is clearly apparent that if the prosecution could have produced Mastrian to testify against Thompson, and describe first-hand the alleged plan, it would have done so. But very obviously Mastrian would give no such testimony, and the state was faced with a lack of admissible evidence; it had only the hearsay story procured from Anderson. It therefore simply claimed a conspiracy, and snuck in through

the back door that which could not legitimately come through the front.

The use of conspiracy theories not to prove the crime of conspiracy but to elevate inadmissible hearsay to legal proof has long been the subject of serious criticism in the profession.

As Mr. Justice Jackson once pointed out, the history of conspiracy exemplifies the "tendency of principle to expand itself to the limit of its logic." *Krulewitch* v. *United States*, 336 U.S. 440, 445. The Conference of Senior Circuit Judges, presided over by Chief Justice Taft, reported in 1925 that:

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused. * * * the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." *Annual Report of the Attorney-General, 1925, pp. 5-6*

The Minnesota Court candidly and repeatedly admitted that without the hearsay testimony of Anderson, Morris, Butler, Ingram and Sharp, there would be no case of murder against Thompson:

> "It must * * * be conceded that without the hearsay testimony of these witnesses the conviction of Thompson would be difficult to sustain." (App. 18a)
>
> "We must concede that in the absence of the testimony of these witnesses it would be difficult to sustain

the conviction of Thompson to the crime . . ." (App. 44a)

The court below did not seem disturbed by the fact that Thompson was not *charged* with conspiracy, but only pointed out that this fact made the state's task even easier.

> "The distinction must be kept in mind between proving conspiracy as a crime, where proof beyond a reasonable doubt would be required, and establishing a conspiracy as a prerequisite to the admission of the statements of alleged coconspirators, where a prima facie showing is sufficient. (App. 19a)

Thus by failing to directly charge petitioner with having conspired with Mastrian (which he certainly did if he purchased the murder as alleged), Minnesota was able to avoid the need to prove that the conspiracy existed beyond a reasonable doubt.

But we believe the distinction drawn by the court below to be fatal to its decision, for a reason which it has apparently not perceived: Unless conspiracy *was* proved beyond a reasonable doubt then Thompson was entitled to acquittal, for unless there was conspiracy—formally charged or not—he could not have been guilty of murder. As that court's decision now reads, it is apparent that Minnesota is content to let the conviction stand even though the conspiracy—certainly essential to a prima facie case of murder—was not proven beyond a reasonable doubt.

As Minnesota has recognized, the term "prima facie" as used in the conspiracy context "is rather a nebulous one that defies exact definition." (App. 20a). The court then went on to define prima facie as "sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy." (App. 20a) But there is no suggestion as to

what standard of proof ought to govern this "reasonable inference" by the trial judge; is it some evidence, substantial evidence, or a preponderance of the evidence? We are not told.

Of course the *standard* applied by Minnesota, so far as semantic distinctions are concerned, would not be violative of due process so long as the operative facts upon the record were sufficient to satisfy whatever standard this Court might determine to be correct. Therefore our challenge must be directed, and is directed, to the sufficiency and import of the *facts* upon which Minnesota relies.

The rule is well settled, as was recognized below, that proof that a conspiracy existed must be established by evidence extrinsic to the hearsay declarations of proposed conspirators. If conspiracy is to be found, then, it must be found on those facts available if Dick Anderson had never appeared in the case, and without the declarations of the other forty thieves.

Carol Thompson was dead, and her death was murder. She was very heavily insured, and Thompson was the beneficiary. Thompson's time at the fatal hour was well accounted for. Norman Mastrian was Thompson's client, and Thompson had bought stock from Mastrian which was sold at a loss. Thompson had been playing house with Jackie Oleson, but the affair had dwindled to an inactive status. Is this enough to show, prima facie, that Thompson and Mastrian had conspired to murder Carol? If Judge Fosseen had never heard of Dick Anderson and his sordid tale, or of the other stout citizens who corroborated his testimony, would be nonetheless have been satisfied that such a conspiracy existed? We are satisfied that he would not.

While the court below has listed certain extrinsic facts which point toward conspiracy, it did so hurriedly and without thoughtful or realistic analysis. (R. 21a)

Petitioner is to be judged, in determining this issue, not as a layman but as what he was—a prominent and successful attorney, expert in the fields of tort, domestic and criminal law. (R. 4a) The insurance question, therefore—certainly the most significant of the several elements offered to establish "prima facie" extrinsic proof—takes on quite a different light than it ordinarily would.

Laymen who are ignorant of the processes of the law, and of the human forces which make these operate, *might* think it clever take out large insurance policies on a spouse and then do her in to collect. But no lawyer—and certainly no criminal lawyer—could ever view such a plan as anything but idiocy. We think the insurance matter, if realistically and honestly viewed, to be strong evidence that Thompson did *not* arrange his wife's death.

If Thompson had planned to kill his wife, he would have known that to insure her for *any* substantial amount would focus attention on him, and inspire some insuror to invest money and manpower probing the circumstances of the death. To kill an insured worth over a million dollars, and then claim on the policies, is like playing Russian Roulette with a fully loaded revolver. Necessarily unlimited corporate funds will be liberated to underwrite an investigation far more searching than any which law enforcement is likely to conduct. And police themselves, confronted with so handsome a profit accruing to the widowed beneficiary, will of course devote their attentions with singular enthusiasm to the recipient of so extraordinary a windfall. While a layman might think he could collect on the policies, a lawyer would realize that they could bring him no money but endless grief. The insurance does not point toward conspiracy.

The association with Mastrian, standing alone and without the embellishments provided by the hearsay, is unremarkable. It was Thompson's business to represent those with legal problems, and these Mastrian admittedly had.

The fact that Thompson took a flyer on some stock and lost money is of no great significance, especially since he was not alone in his miscalculation (the E. F. Johnson Co. took a similar loss.) But most important, even if all of the other elements—each of which points only to Thompson, but not to Mastrian—are taken in combination as showing that Thompson conspired with *someone* to have Carol killed, certainly the evidence of their relationship alone does not yield any peculiarities or suspicious facets which warrant an inference that Mastrian was that someone. And unless the evidence shows that Mastrian and only Mastrian was the coconspirator, evidence of his declarations was inadmissible.

The extra-marital affair cannot seriously be viewed as establishing a conspiracy between Thompson and Mastrian. It does little more than establish a conspiracy to commit adultery, to which Jackie and petitioner were the only parties. This is but another in a long string of cases where proof of adultery has been punished with life imprisonment because the aggrieved spouse happened coincidentally to be murdered.

There is nothing in the facts of this rather ordinary affair to suggest problems or passions which might incite uxoricide. It was clear from the testimony of the state's own witness—Jackie—that Thompson, for all the pleasures of dalliance, highly valued his wife and had neither the desire nor the inclination to leave her.

At the time of the murder the affair had died to a fizzle. The relationship with Jackie is not evidence of conspiracy, but merely an alternative motive for murder for those of the jury who could not digest the insurance situation as a provoking cause. And like the insurance, the affair might have pointed generally to conspiracy, but in no way to Mastrian.

These are, we feel, all of the elements of extrinsic proof which belong in the category of truly independent evidence. The court below, in reciting further facts to buttress its ruling on the "prima facie" has fallen we believe into the omnipresent trap which lurks in every conspiracy case.

It is axiomatic that the *existence* of a conspiracy—by "prima facie" or any other standards—is never to be determined by reference to the content of the hearsay sought to be admitted. But no matter how often the rule is echoed or accorded lip service (App. 20a), courts continue to affirm conspiracy convictions by "bootstraps" techniques.

Listed by the Minnesota Court as pieces of extrinsic evidence are (1) the removal of the dog, (2) the removal of the telephone, (3) petitioner's arrival at his office early on March 5 and March 6, 1963 and (4) return of a $2500.00 fee by Thompson to Mastrian through an Attorney Connolly. But ignored or overlooked by that court is the fact that none of these items has any particular significance *except* with *reference to Anderson's story.*

The absence of Schatzie was well-explained, and was not even suggested by Anderson as part of the plot. The absence of the portable telephone is of no significance standing alone, and makes very little sense even in the context of Anderson's tale; there was no apparent reason for luring Mrs. Thompson to the kitchen to be killed, and this whole aspect of Anderson's statement sounds very much like police coaching; especially in view of the fact that Thompson did *not* call home on March 5, the day Anderson claims he was supposed to commit the murder.

Petitioner's presence in his office before 9:00 a.m. was well accounted for in terms of business, and does not point to conspiracy with anyone, let alone with Mastrian. And the return of the fee occurred *after* the murder, and literally screams against the notion of conspiracy with Mastrian. Why in the world would an attorney paying off a murderer

in cash do so through a third party and thus create evidence of the transaction?

It has been all too common for reviewing courts to affirm convictions for conspiracy where the hearsay declarations preceeded the requisite prima facie showing of agreement, in the name of a trial court's latitude in the order of proof; this practice, condoned by Minnesota in this case (App. 20a), is vicious and ought to be condemned. Once the informative declarations are in evidence, it becomes all but psychologically impossible to avoid relating the so-called extrinsic proofs to them, as was done here. If it were mandatory to show affirmatively the existence of an illegal agreement before one word of conspiratorial hearsay was admitted, the hazardous attractions of bootstraps procedure might better be avoided.

We think this conviction, from the aspect covered by this section, can be fairly tested by reference to a civil proceeding. If we regard "prima facie" as being that standard of proof which, uncontradicted, would carry a civil case to a jury, and assume that Thompson's insurance claims had come to trial, good analogy can be made. In this hypothesis, of course, the testimony of Anderson and his felonious friends is eliminated, for we are testing the extrinsic proof. If the insurors had defended on the ground that Thompson plotted his wife's death, and had offered in evidence those facts which would have been available had not Anderson's alleged role come to light, would there have been enough to submit this particular defense to a jury's consideration? And if so, was there such evidence as would have warranted a jury in finding that Thompson conspired with *Norman Mastrian* to procure the death? We think both questions must be answered in the negative, and that accordingly it must be said that the hearsay in this case was erroneously admitted.

IV. The Denial of a New Trial to Petitioner, in the Light of Evidence Discovered After Trial, Has Violated His Right to Due Process of Law.

Inasmuch as it is always more comforting to decide that one who is factually guilty has been accorded due process, the vexation of the court below in treating this issue is understandable. That court said:

> "We come then to the final and we think one of the *important* claims of the defendant, namely, that the trial court should have granted his motion for new trial based on newly discovered evidence." (App. 45a)
>
> "It may well be true that if another jury heard all of these statements they would be less likely to believe Anderson. It may also be true that if they knew of the treatment accorded Morris, Sharp, Ingram and Butler they would discount their testimony on the grounds that they have testified as they did as the result of promises of leniency." (App. 47a)

We must dwell upon this issue because the facts upon which it rises, and the many subordinate and ancillary issues intertwined with it, embody the most maddening and disheartening aspects of our criminal law generally, and of this case in particular.

Important principles—not legal principles, but practical and political principles—which are continually operative in the machinery of criminal jurisprudence are exposed and highlighted by the entire post-trial history of this case. The vice inherent in mixing so volatile and expedient a business as politics with the unpopular but essential business of justice to the scorned is pointed up very clearly in these proceedings. Also illumined is an empirical principle of criminal law which those of us who make it operate learn

almost before we learn the name of Wigmore: States who win sensational and grueling criminal convictions cling to their preservation as tenaciously as they would protect against a threat to deface their Great Seal, fearful that some jurisdictional monument will lose its shine. Surely this is just such a case.

Without the testimony of creatures whose only claim to humanity is their ambulatory and articulate state in the courtroom, the case of *Minnesota* v. *Thompson* would be a joke. The conviction rests almost *in toto* on the off chance that for one brief moment in their useless lives these men happened to tell the truth. Accepting their word for even the time of day was a dangerous undertaking, but Thompson's jury was persuaded to believe them. If we may presume that the jurors were conscientious and decent citizens, we must presume that they did so with hesitation and deliberation, for no honest man likes to rely upon the assurance of a pathologically forked tongue.

It cannot be doubted that the absence of any demonstrable motive on the part of the felonious five—Anderson, Morris, Ingram, Sharp and Butler—was an important factor in the decision of the jury to believe what they had to say. In the light of what has been shown since that verdict was rendered, we think it obvious beyond the need to argue that no qualified juror would now rely on the single or collective word of this group to risk so much as a twenty-cent bet. But admitting that it could not now obtain another conviction, Minnesota clings fervently to the water that has gone under the dam.

Implicit in its dictum (App. 47a), although not articulated as such, is the recognition of the court below that the record it reviewed was rife with perjury on critical points. We have recited in our statement of facts (see p. 27, supra) the disclaimers of Morris, Sharp and Ingram which were testified to when evidence of promised leniency was

sought. Having in mind that men of this caliber do not move one inch for the sake of either truth or justice, but only for their own benefit, we think not only warranted but inescapable the inference that they knew that they were going to be paid for their testimony, and knew it at the time they denied the fact under oath.

These deals did not come from jailers, court officers or judges; they came, and could only have come, from the prosecution or its agents. This perjury was suborned, even if only because the prosecutor sat in the courtroom while these sanctimonious declarations of "no promise" were being made before the jury, and did not seek to correct the record with the truth.

> "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue* v. *Illinois*, 360 U.S. 264, 269.

It would be difficult to ascribe such failure to inadvertence, but even if the most charitable approach is taken and it is assumed that these denials did not come to the attention of the state as they were made, certainly the suggestion of the prosecutor to the jury in his closing argument that no inducements had been shown was designed to conceal the fact. It would take an incredible naivete to assume that these men—so graciously treated once their appointed functions had been performed—were not told in advance what they must do, and what the reward for the deed would be. It is manifest that if petitioner had known the extent to which these men were to be compensated for their services he would have been enabled to impeach them at trial to the point where their testimony would have been discounted.

One of the fundamental concepts of due process is the notion that in a criminal trial the balance shall be held "... nice, clear and true between the State and the accused

. . .", *Tumey* v. *Ohio*, 273 U.S. 510, 532. But in this lawsuit the prosecution had, and exploited, unconscionable advantage of its powers. This is not a rare or unusual circumstance, but one which arises all too frequently in the administration of criminal justice. It is a situation which needs the attention of, and clarification by, this Court.

Despite the currently fashionable hue and cry by prosecutors that recent decisions by this Court implementing important constitutional rights in state prosecutions have operated to give the nation over into the hands of thieves, and frustrate all law enforcement, in many areas of the practical administration of justice the state has, and is wont to exploit, several powerful weapons to which the defense never has access. The most significant of these is *access* to criminals facing trial whose testimony could be useful in some important prosecution, and a plentiful supply of the only *currency* in which such men are interested—the promise of early freedom. The prosecution is thus often enabled to produce testimony which the defense could never get, simply because the defense has nothing to offer but the likelihood that the witness will be given extra punishment for frustrating the desires of the prosecution.

Many arguments are advanced for the need to use testimony by coconspirators, felons, informers and others whose loyalties shift easily toward prospective personal advantage wherever that may lie. It is also argued that rewarding such cooperative efforts with leniency is a necessary prerequisite to securing the desired evidence, and that only through the use of such tactics can the more sinister and important criminals be brought to book.

Without conceding entirely the legitimacy of these propositions, we do point out that such methods introduce a great risk of perjury into any proceeding, and ought to be used only if subject to very strict controls. If in a given

case a prosecutor feels that the greater good will be served by rewarding some lesser criminal in order to use his testimony in bagging bigger game, he ought at least to have an absolute duty of disclosure so that the trier of fact will know the inducement when credibility is being judged. We think that this principle is of sufficient importance to be rooted in fundamental fairness of procedure, and embodied in due process of law.

Jurors are lay citizens, naive and inexperienced in comprehending the criminal intellect. Unless given all of the facts, they may be deluded into thinking that the co-conspirator on the witness stand has suddenly received an injection of conscience.

In this case the testimony of Dick Anderson might well have been interpreted by the jury to be some final act of decency by a man overwhelmed with guilt for his beastly deed. Whatever their reasons, it is perfectly clear that the jurors believed him; and they did so without knowing of the many cozy conversations which had transpired between Anderson and Prosecutor Randall. Had they been told that Randall expected to ride to high political office on petitioner's scalp, and that Anderson was to be paid off with freedom within a few years, it is most probable that they would have taken an entirely different view of the matter and refused to rely on such purchased evidence.

The chain of events which has led to the several contradictory stories now on the record is deserving of analysis. In the first instance, Anderson was facing a charge of murder in the first degree which he had reason to think could be proven against him unless he could have the aid of expert counsel. He attempted to get such counsel by extracting money from Thompson, and failed; then, being unsatisfied with representation by the public defender, Anderson elected to "cooperate" on his own. He wound up on the witness stand under oath admitting to pre-

meditated murder. The inference of inducement is strong, because he could place himself in no worse position than by admitting to what he had done. But he was not pressed (for reasons not very clear upon the record) on the question, and Mr. Randall in his closing address plainly assured the jury that no inducement had been offered, and that such a notion was inconsistent with the integrity of himself and his assistants.

Anderson performed well enough to cause the conviction of both Mastrian and Thompson; he then pleaded guilty to murder in the first degree. This latter step indeed suggests that the improbable had occurred—that Anderson, without benefit to himself, had testified against these two only to bring them to justice.

But within a short time of this plea, Anderson suddenly had a different story to tell; and the manner in which it cropped up is persuasive of its spontaneity. It was not a story given for the first time to counsel for Thompson, but was in the form of a letter addressed to two of the top officials in the state who were *not* connected with the prosecution. It is apparent that after stewing for a month or so over the double-cross he had suffered, Anderson began to doubt the palliative promises which had been used to mollify him and decided to act.

Whether he recanted because of some small pang of conscience for having framed Thompson, or as a matter of retribution against those who had not made good to him their collusive guarantees does not matter. The fact remains that he recited in detail and under oath—obviously a meaningless formality to Anderson—a very plausible story of pretrial contracts with the prosecutor which served for the first time to explain why he was willing to admit to murder paid and planned. He described the homicide in terms much more logical than those offered at trial—the result of a bungled burglary. He explained his moti-

vation for implicating Thompson in the first place, and his reason for formalizing this implication with sworn testimony at trial. He recited conversation with the prosecutor which remains as the only logical explanation which has ever appeared for Anderson's "cooperation." And he admitted to having perjured himself at trial on many important points, both primary and collateral.

After these disclosures, Anderson was removed from Stillwater—eventually to a *federal* prison no less. Why this move was made is not explained—for Anderson said to the end that he had never complained of being threatened until *after* he was taken out—and why officials of the United States came to the aid of the prosecution is even more obscure.

When Anderson was finally produced in court for the hearing, he switched his tale again—partially. He confirmed numerous important particulars of his recantation, but reverted to the story that he had been paid to kill Carol. His recantation was, he said for the first time, induced by threats.

His description of these threats, as to Thompson at least, was incredible. If Thompson were the kind of man who could calmly plan and order his wife's murder, it is hardly probable that he would threaten Anderson with so gentle a proposition as the use of his children's efforts to frustrate some future parole—which could never have occurred because parole for Anderson was not possible. But when counsel for Thompson and Mastrian sought to delve into these alleged threats, and expose them as more perjury, they were flatly denied an opportunity to do so. Anderson refused to name the communicants—doubtless because there were none—and the trial court was unable to compel him to do so.

We appreciate the fact that Judge Fosseen did hold Anderson in contempt on the occasions when he refused

to identify those who supposedly threatened him, but this helpless gesture did not serve to accord petitioner his absolute right to seek out and expose this false story. It is difficult to imagine a more convenient method by which Anderson could have avoided ratification of his deposition to defense counsel. As a prisoner serving life, he was effectively immune to punishment for contempt. He therefore shielded himself against the prime engine of legal truth known to our law—cross-examination. We think that in view of the inability of the Minnesota trial court to furnish Thompson with his right of cross-examination, Anderson's testimony at the hearing of September 15, 1964, should be stricken from the record. This use by the state of unconscionable advantage of a witness' silence is very much like that which was condemned recently by this Court in *Douglas* v. *Alabama*, 380 U.S. 415.

We are well aware of the oft-reqited principle that trial judges must have broad discretion in the grant or denial of new trials for evidence claimed to be newly discovered. But this discretion, however broad, must nonetheless have *some* limitation within the framework of due process, or a trial judge through arbitrary action could turn aside the most positive proof of a convict's innocence. We believe that the record we challenge discloses grounds for retrial so compelling that Minnesota's refusal to accord one transgresses even the most extreme limits that the Fourteenth Amendment can afford. In summary, the denial of petitioner's motion for new trial was, in the circumstances, violative of his constitutional right to fundamental fair procedure in three ways:

(1) The judgment below seeks to deprive petitioner of his liberty despite the apparent fact that evidence now available would most certainly produce an acquittal if put to a jury.

(2) The prosecution abrogated its duty to disclose to the defense, and thus to the jury, the promises, inducements and collaboration with which its criminal witnesses were indulged.

(3) The trial court failed to force disclosure by Anderson of the individuals who communicated the alleged threats, thus denying petitioner his absolute right to demonstrate that these claimed threats were non-existent, and that Anderson's exculpatory statement was the truth, not the product of coercion.

We think it ill-suits the integrity of the State of Minnesota to maintain intact a criminal conviction as grave as this one in the face of its own admission that because of information withheld from the defense until after the trial was over, another conviction could not be obtained. However unpleasant the retrial of a major case such as this one might be, and no matter how great the damages to Minnesota's coffers or its pride should that retrial be held, these are sorry circumstances indeed in which to deprive a United States Citizen of his liberty.

Conclusion

For the several reasons set forth above, petitioner urgently prays that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of Minnesota.

Respectfully submitted,

F. Lee Bailey
40 Court Street
Boston, Massachusetts

Of Counsel:
Wallace A. Thompson
Winnebago, Minnesota

Appendix A

STATE OF MINNESOTA, RESPONDENT,
v.
T. EUGENE THOMPSON, APPELLANT.

Nos. 39343, 39702.

Supreme Court of Minnesota.

Jan. 7, 1966.

Syllabus by the Court

1. While an indictment must be based on competent evidence, it will not ordinarily be quashed because some incompetent evidence comes before the grand jury if there is sufficient competent evidence to sustain it.

2. When there is prima facie proof of the existence of a conspiracy to commit a crime, the acts and declarations of any of those in the conspiracy made in furtherance thereof become admissible as evidence in the trial of any of the coconspirators. While ordinarily hearsay statements of alleged coconspirators should not be admitted until there is prima facie proof of the conspiracy, the trial court is allowed some latitude in the order of proof; and if an examination of the record as a whole shows facts from which the court could reasonably infer the existence of a conspiracy the case will not be reversed because the proof of a conspiracy came at the wrong time. In this case the evidence sufficiently establishes a conspiracy so that the hearsay statements of alleged coconspirators were admissible.

3. Where police officers in their investigation of a crime enter premises on which the crime was committed owned or occupied by one not then suspected of complicity in the crime, with his express or tacit consent, and in the process discover and seize articles or instruments used in the com-

mission of the crime, there is no unlawful invasion of privacy of the owner or occupant of the premises. If upon further investigation the owner or occupant of such premises is charged with complicity in the crime he cannot then retroactively suppress such evidence as the fruits of an unlawful search and seizure.

3a. Where defendant's motion to suppress evidence as fruits of an unlawful search and seizure is denied he has sufficiently preserved his record so that the action of the trial court may be reviewed on appeal.

4. After a witness is called and testifies for the prosecution an accused person has the right to examine unprivileged pretrial statements of the witness for the purpose of determining whether he wishes to use such statements for impeachment purposes, without laying any further foundation than showing that such statements were made. If the prosecution objects to the relevancy of the statements, the court shall examine them in camera and excise those portions not relevant to the testimony of the witness. All portions of the statements so excised shall be made a part of the record so that the court's action in denying the accused access to them may be reviewed on appeal.

5. Where it appears that a juror has read newspaper articles discussing certain aspects of a criminal case, before such conduct will furnish grounds for a new trial, it must appear that the juror read such articles and was influenced thereby to the prejudice of the defendant and that, having knowledge of the fact prior to submission of the case to the jury, defendant requested appropriate action by the trial court.

6. Where the venue of the criminal case was changed from Ramsey County to Hennepin County at the request of the accused and no further request was made for a change from Hennepin County, and it does not appear that the 12 jurors accepted to try the case were biased,

a new trial will not be granted unless it appeals affirmatively that the defendant did not have a fair trial.

7. The evidence in this case contained in a voluminous record has been thoroughly examined and found to be sufficient to sustain the conviction of the defendant. Hearsay evidence of alleged coconspirators admitted after the court has found that there was prima facie proof of conspiracy coupled with circumstantial evidence corroborating such hearsay testimony was sufficient to support the jury's finding of guilt.

8. Where one of the alleged coconspirators repudiated his testimony at the trial and a hearing was granted to test the credibility of such repudiation, at which time the alleged coconspirator reaffirmed testimony given at the trial, and the court found that such witness told the truth at the trial rather than at the time of the repudiation, we accept the decision of the trial court in refusing to grant a new trial based on such newly discovered evidence.

C. Paul Jones, Minneapolis, for appellant.

Robert W. Mattson, Atty. Gen., William B. Randall, County Atty., Henry W. Pickett, Jr., Asst. County Atty., St. Paul, for respondent.

KNUTSON, Chief Justice.

Defendant was convicted of first-degree murder and appeals from an order denying his motion for a judgment of acquittal notwithstanding the verdict or for a new trial; from a supplemental order denying his motion for a new trial on the grounds of newly discovered evidence; and from the judgment of conviction.

The conviction resulted from the brutal murder of defendant's wife, Carol Thompson, on March 6, 1963, admittedly by one Dick W. C. Anderson.

At the time defendant's wife was killed defendant was a practicing attorney of some prominence in the city of St. Paul. He was admitted to the bar in 1955 after having attended Macalester College from 1946 to 1950 and the St. Paul College of Law from 1951 to 1955. After working at some jobs that are not of importance here, he began practicing law and was quite successful, mainly in the fields of personal injury, domestic relations, and criminal law. He was very active in bar association activities and did some teaching at the William Mitchell College of Law.

While attending Macalester College defendant met and married his wife. They have four children, a son born in 1949, and three girls born in 1951, 1953, and 1956. The family moved into the home in which they were living at the time of Mrs. Thompson's death in 1958. The home is located at 1720 Hillcrest Avenue in St. Paul. Both defendant and his wife were active in many community affairs and in their church. Defendant had served as an elder and a trustee of his church. So far as the record shows, their married life was harmonious and they seemed to get along well together, taking many trips with each other.

During the summer of 1960 defendant commenced a social relationship with one Jacqueline Okoneski whom, to begin with, he had represented in a divorce action. The relationship continued on a fairly regular basis until December 1961, and included dinner dates, visits by defendant to her apartment, some trips to out-state motels, frequent trips to a lake home at Forest Lake, Minnesota, owned by Carol's father, and one trip to Chicago. During 1961 Jackie attended a business school. She paid the tuition and expenses with money borrowed from defendant and upon her completion of this study was employed by defendant as a secretary. She repaid the money borrowed to pay for her education. In December 1961 Jackie began dating one

Ronald Olesen, and early in 1962 returned a ring to defendant which he had given her shortly before that time. In the month of January 1962 Jackie terminated her employment with defendant's law firm. After December 1961 she dated defendant only a few times and on those occasions indicated that she was interested in marrying Ronald Olesen. She testified that in February 1962 defendant asked her if, before she made a final decision, she would give him a year or 11 months to get his financial affairs straightened around so as to arrange for the financial well-being of his family, but that she refused to do so. It appears that after the early part of 1962 Jackie saw defendant only a few times for business purposes. In June 1962 she married Ronald Olesen. Sometime later in the summer of 1962 she came to defendant's office to discuss with him obtaining a divorce from Olesen, and papers were drawn to commence a divorce action. According to Jackie, she had lunch with defendant during the summer of 1962 and he asked her if she would marry him if he put $10,000 in the bank in her name, but she replied in the negative. In September 1962 Jackie's divorce action was commenced by defendant. The papers were personally served upon Olesen by defendant. It appears that in October 1962 a reconciliation was contemplated and defendant requested a friend of Jackie's to discourage her from such reconciliation with her husband. It does appear that in November 1962 Jackie and her husband were reconciled and living together. Defendant called her a few times and in December 1962 he had some harsh words with her husband, who would not permit defendant to speak with Jackie. She testified that sometime shortly after Christmas 1962 defendant called her at her work and asked her if she would be interested in taking an apartment in a building he owned, but that she refused. This appears to be the last time he contacted her prior to the death of Mrs. Thompson.

In January 1962 defendant and his wife traveled to Chicago and visited with acquaintances by the name of Mr. and Mrs. Bruce Gove, whom they had known since their days at Macalester College. Mr. Gove was in the insurance business and after being informed that Carol Thompson had very little insurance on her life he strongly urged Thompson to purchase some such insurance. He recommended a $50,000 ordinary life policy. Upon their return to St. Paul defendant had a conversation with his regular insurance agent, James Treanor. Inquiry was made about term insurance, and as a result of this interview and further negotiations defendant purchased insurance, much of which was term insurance with accidental death benefits, or purely accidental death insurance. This brought the aggregate insurance on her life to $1,061,000. The attached chart shows the amount and nature of the term insurance and the time it was purchased.

Defendant explained to Treanor and testified at the trial that his desire for this amount of insurance was based on the fact that if he died first his wife and children would have approximately $1,000,000 to live on by combining the insurance he carried on his life, which amounted to some $460,000, and an anticipated $500,000 inheritance she would receive from her father, a successful plumbing contractor of considerable wealth. Defendant testified that in order to have an equal amount for himself and his children if Carol should die first he purchased this insurance amounting to somewhat over $1,000,000. He also stated that he had reached a position in life where he could easily afford it out of an unneeded monthly retainer which he received from the company owned by Carol's father. He stated that he had a premonition that his wife was going to have a tragic accident on February 8 or 9, 1963, and that he had had such premonitions previously when his brother and sister had died unexpectedly.

In July 1962 defendant was contacted by one Norman Mastrian in connection with a possible false arrest of Mastrian in Anoka. Mastrian had attended Macalester College about the same time as defendant, but it appears that defendant did not remember him from those days. On July 31, 1962, defendant agreed to represent Mastrian if he were paid a retainer of $2,500. Mastrian had no such money but did own stock in Telostat Corporation. Defendant agreed to take 1,000 shares of the stock in lieu of his retainer, but the company refused to make the transfer in that manner, so defendant paid Mastrian $2,500 in cash and then immediately took it back, as well as the stock. Further negotiations led to the purchase of the remaining 2,200 shares of stock in this company owned by Mastrian, for which he paid $1.25 a share, or a total of $2,750. Defendant testified that he was interested in acquiring controlling interest in the Telostat Corporation. On December 31, 1962, he had ascertained that the stock was virtually worthless and sold all of his stock to the president of the company for $800.

It appears that from August 1962 through February 1963 defendant met Mastrian in various places and spoke to him on the telephone on numerous occasions. During this time he was admittedly representing Mastrian in several legal matters.

Up to this point there is not much dispute in the evidence.

The conviction rests upon an alleged conspiracy between Thompson and Mastrian to commit or procure someone to commit the murder of Mrs. Thompson. The evidence relating to this conspiracy is much in dispute; but briefly the testimony of witnesses, if admissible would justify the jury in believing that the following acts transpired:

Prior to January 24, 1963, the Thompsons had a dog in their home which would bark when someone came to the house. On that date defendant took the dog to a veteri-

narian and asked him to find a new home for the dog. It was his claim that they had installed new carpeting in the home in January and that they had been unable to train the dog, so that she had stained the previous carpeting and they felt they had to get rid of her in view of the new carpeting. There was some dispute in the evidence as to whether Carol knew why the dog was given away or concurred in getting rid of her.

It was also shown that the portable telephone, often kept in the bedroom upstairs, was removed on March 4, 1963. Defendant claimed that it was removed because they wished to exchange it for a color telephone more in harmony with the new decoration in the house. The telephone was found in defendant's car after Mrs. Thompson had been assaulted.

In late February 1963 Mastrian began looking for someone to commit a murder for hire. One Sheldon Morris testified that in late February 1963 he was present when Mastrian asked one Richard Sharp if he would commit a murder for $2,000, to which Sharp replied that he was not interested but he knew a man by the name of Bill Ingram who might be interested. Morris testified that he was present when Mastrian asked Ingram if he was interested in killing a woman for $2,000. Ingram said he was not interested. Morris then testified that on March 2, 1963, Mastrian asked one Henry Butler if he would take the contract, but that Butler declined. Morris further testified that on the morning of March 4, 1963, Norman Mastrian told him that he had to go to meet defendant at a pancake house in St. Paul, and that Mastrian borrowed his car that same evening to meet Thompson in the parking lot behind McGuire's Restaurant.

Richard Sharp testified that he had been offered a job by Mastrian to kill a churchgoing woman with four children and that Mastrian had suggested that it be done by hitting her, with a rubber hose and then drowning her

in the bathtub. He was told that she was heavily insured and that the price for the job would be $2,000 unless it looked like an accident, in which case it would be $3,000. Sharp then testified that on or about March 2, 1963, he introduced Mastrian to Dick Anderson, and that he, Sharp, was present on March 3 when Mastrian offered the job to Dick Anderson, who replied that he would think about it. He testified that on March 4 he gave the gun to Mastrian that was used 2 days later in the beating of Carol Thompson.

Willard Ingram testified to the conversation that he had with Mastrian and corroborated the testimony of Morris and Sharp.

Henry Butler testified that he had been offered a job of killing by Mastrian and that he was present when Mastrian gave the gun to Anderson; and that on March 4 or 5, 1963, he had heard Mastrian ask Anderson, "What happened today? I had a perfect alibi."

Dick W. C. Anderson then testified that he met Mastrian on March 3, 1963, and that Mastrian asked him on that day if he was interested in killing a woman, to which he replied that he would think about it. He testified that later that same day Mastrian called him, and at that time Anderson said he would ake the contract to kill the woman, but he would have to have half the money, $1,000, before he did the job. Anderson then testified that Mastrian arranged to meet him on the evening of March 4 and at that time told him that he could get only $200, but that he would get the rest by the following Friday. Anderson testified in detail as to how the killing was to be done. He then said:

> "This was the first time I had heard the name of Mr. Thompson. He [Mr. Mastrian] says, 'Mr. Thompson will have the door open in the morning.' He says 'You will be able to go inside and go down in the basement and wait.' He says, 'At 8:25 Mr. Thompson will call Mrs. Thompson and,' he says, 'at that time you

will be able to sneak up the stairway.' He says, 'Mrs. Thompson will be right around in the kitchen answering the telephone. The other telephones in the house will be removed so that she has to come downstairs.' "

Anderson testified that they then picked up a hat for Anderson to wear while doing the job and then proceeded to St. Paul, where:

"We went over to the Highland Park area and he drove me past the residence at 1720 Hillcrest in the front. He says, 'Look good at the front of the house.' We did and then we went around the alley and we made several trips around the alley and around the front of the home. Then we finally pulled up in front of the home and then I—he showed me the inside door, pointed it out to me and said that there is no back door on the residence. He says also at 6:00 o'clock in the morning there is no movement around on the streets and that there is no lights on in this section. And then I asked him about coming out in the morning, this side door, I asked about the people that lived next door to the east of the Thompson residence. He told me there was a widow lady that lived there and she didn't get up early in the morning and she also slept on the opposite side of the home. He says, 'You won't have to worry about anybody seeing you as you come out in the morning.'

"* * * At that time he took a rubber hose out from underneath the front seat of his car and he told me that the woman should be hit at an angle across the back of the neck to more or less simulate falling in the bathtub. I asked him about the water in the bathtub and he said, 'Mr. Thompson will leave water in the bathtub.' I discussed further with him about the body, whether it should be face down or up if she fell in the bahtub. He said, 'Be sure and have it so the

body is up as far as the bathtub goes,' and he instructed me as far as reverse artificial respiration on the chest."

Anderson also testified that when questioned Mastrian admitted that insurance was involved and that Mastrian drew diagrams of the house so that he could find his way around; that they purchased rubber surgical gloves; and that Mastrian took him home, gave him a rubber hose and the hat, and said he would call that night. He testified that Mastrian did call him about midnight on March 4 and told him that the job could be done on the morning of March 5, 6, or 7, but had to be done before March 8. He testified that Mastrian called him about 9:30 in the morning of March 5 and asked him if the job had been done and was informed by Anderson that he did not do it that morning and wanted a gun in case anything went wrong. He testified that Mastrian delivered a gun to him on March 5 and, after he had assured Mastrian that the job could be done the next morning, Mastrian said, "Well, I will have to see Mr. Thompson again and see if everything will be in the clear"; that Mastrian called later on March 5 and informed him that everything was clear, and that he then proceeded to do the job.

Anderson testified in detail that he entered the house by the side door and hid in the basement until he heard Mr. Thompson and the children leave. The telephone rang and Mrs. Thompson came down to answer it. He said that the stairs going to the basement had squeaked when he came in so, rather than alarm her, he waited until she had returned to her bedroom and then went up and told her that he was looking for money and would not harm her. He told her to lie on her face, and when she did, he hit her at the base of the skull with the rubber hose as hard as he could, and carried her body to the bathtub where he intended to drown her by reverse artificial respiration, but

she came to and escaped from him and ran back to her room. He said that he then tried to shoot her, but that the gun refused to fire, and that he hit her with it. She ran downstairs and tried to get out the front door, but it was locked with the chain latch which prevented her from doing so before he again struck her with the gun. He then took a knife from the kitchen and stabbed her in the throat, and the handle of the knife broke off, leaving the blade in her throat. He thought she was dead or dying and went back to the bedroom to create the appearance of an attempt to commit burglary. Then he heard the door shut downstairs and went down to find that Mrs. Thompson had gone.

It appears that after escaping from the home subsequent to the assault upon her by Anderson, Carol ran to the neighbor's house next door but was unable to get help there. She then ran to the home of Mrs. Ruth Nelson, where she collapsed after asking for help. She was asked, "Who did this to you?" and answered, "A man" before collapsing. The police were called and she was taken to Ancker Hospital, where she died about noon.

Anderson testified that after he found that Mrs. Thompson had gone he left the house by the front door and went back to his apartment where he received a call from Norman Mastrian. He put the clothing he had worn into a laundry bag and met Mastrian and Sheldon Morris and the three of them rode north of the Twin Cities and threw the clothing and gun out of the car while driving along side roads. Anderson got out of the car at Anoka and took a cab back to Minneapolis.

Sheldon Morris testified that 2 days after Mrs. Thompson was killed he drove Mastrian to Forest Lake, where her father owned a cottage frequently used by the Thompsons. They parked the car and waited for about an hour and then drove back to Minneapolis. On the following night, March

9, and in the afternoon on March 10, this trip was repeated, and each time after waiting about an hour they returned. Morris testified that on March 15 he delivered $800 from Mastrian to Anderson, with the message that that was all the money Mastrian could raise at that time, and that Anderson should not bother him until he (Mastrian) could make contact with the payoff man. He testified that on or about March 15 an attorney, John Connolly, gave Morris 25 $100 bills, to be given to Mastrian, and that on April 15 he delivered an envelope from Mastrian to Anderson that was supposed to have $1,500 in it, with a message that it would be all the money Anderson could expect until Mastrian received his money from the payoff man. Anderson then informed Morris that he would be gone for about 2 weeks and wanted the rest of his money upon his return "or else." Before Anderson could return he was apprehended and arrested in Phoenix, Arizona, in connection with this crime.

It is not disputed that defendant arrived at his office on March 6 earlier than usual and shortly thereafter had his secretary call his home. She spoke to defendant's wife and then turned the telephone over to defendant, who informed his wife that he would be unable to return home early that afternoon as they had planned.

About 9:15 a.m. on March 6 defendant was informed by a son of Mrs. Ruth Nelson, the neighbor to whom Carol had gone for help after being attacked, that his wife had been stabbed and would be taken to Ancker Hospital shortly. Defendant left his office with an associate, Donald Kelly, and went immediately to the Nelson residence. Upon arriving there he found that Carol had been taken to Ancker, so they drove there. While at the hospital that morning defendant suggested to the police who were there that robbery might be the motive for the crime and suggested that they go to his home and look in the basement

to see if quite a large sum of money he kept there had been taken. Later in the day he spoke again to the police, and produced a briefcase which had been in his office in which were found 44 $100 bills. On March 8 defendant indicated a desire to withdraw $5,000 in cash from an account he had for the purpose of hiring private investigators, but was advised by his associate that it would be unwise to withdraw such money in view of the questions that had been raised about the insurance he had on his wife. On the same day he again spoke with the police and said the hose found in defendant's bathroom after the killing probably came from his lake home but he did not know how it came to be in the bathroom.

On March 20, 1963, defendant was contracted by attorney John Connolly, who was then representing Mastrian, and asked to bring certain files of Mastrian's to Connolly's office. In addition to the files defendant gave Connolly 25 $100 bills and said it was the return of the retainer which Mastrian had given him in connection with the matter in Anoka County. In the examination of defendant, he admitted he had done considerable work for Mastrian but had never had an accounting with him.

The venue of the case was ultimately changed from Ramsey to Hennepin County at the request of the defendant, and the case was tried there by a jury, commencing on October 28, 1963, and ending on December 6, 1963. Defendant was found guilty of murder in the first degree and sentenced to life imprisonment in the state penitentiary.

The appeal raises a number of questions, some of which must be considered separately from the others. In discussing them additional facts pertaining to each issue will be stated hereinafter. The assignments of error pose the following questions:

(1) Was the indictment based on competent legal evidence sufficient to sustain it?

(2) Was there sufficient proof of a conspiracy so as to render admissible against Thompson the hearsay statements of alleged coconspirators?

(3) Should the evidence procured by police officers in searching the Thompson home have been suppressed as the fruits of an unlawful search and seizure?

(4) Was it reversible error to deny defendant's motion for leave to examine a pretrial statement of a prosecution witness?

(5) Was misconduct of a juror in reading newspaper articles concerning the trial grounds for a new trial?

(6) Was defendant denied a fair trial due to publicity given the case?

(7) Does the evidence as a whole sustain the conviction?

(8) Was it error to deny a new trial based on newly discovered evidence pertaining mainly to a repudiation by Anderson of his testimony at the trial?

MOTION TO QUASH INDICTMENT

1. Defendant moved to quash the grand jury's indictment on the ground that it was not based on competent evidence. The case was first submitted to a grand jury that failed to indict. Thereafter Anderson confessed and the case was submitted to another grand jury, which did return an indictment. Defendant's argument is that inasmuch as the minutes of the clerk of the grand jury failed to show that Anderson appeared before it, his confession must have been related to the grand jury as hearsay by others and that an indictment based on such hearsay cannot stand.

The statutory provisions involved are Minn.St. 628.59, which reads in part:

"In the investigation of a charge for the purpose of indictment * * *, the grand jury shall receive no other evidence than:

"(1) Such as is given by witnesses produced and sworn before it; and

"(2) Legal, documentary, or written evidence.

"It shall receive none but legal evidence, and the best in degree to the exclusion of hearsay or secondary evidence, except when such evidence would be admissible on the trial of the accused for the offense charged,"

and § 630.18, which, so far as material here, reads:

"The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

"(1) When it shall not be found, endorsed, and presented as prescribed in sections 628.41 to 628.67 relating to grand juries."

Very few of our cases deal with the quashing of an indictment due to the insufficiency of the evidence to sustain it. Obviously, an indictment based only on incompetent evidence ought to be quashed. The question arises at what point the indictment becomes subject to a motion to quash when there is some competent evidence before the grand jury. We have held that an indictment will not be quashed because some incompetent evidence comes before the grand jury if there is sufficient competent evidence to sustain it. State v. Marshall, 140 Minn. 363, 168 N.W. 174.

In State v. Ernster, 147 Minn. 81, 179 N.W. 640, we did remand with directions to quash the indictment, but it is somewhat difficult to determine from the opinion whether this was based on the insufficiency of competent evidence or on the presence in the grand jury room of persons who had no right to be there. We said (147 Minn. 83, 179 N.W. 640):

"* * * We have * * * held that the fact that hearsay or illegal evidence was heard and considered by a grand jury is not sufficient ground for quashing an

indictment, for there may have been other and competent evidence received to warrant its finding. State v. Marshall, 140 Minn. 363, 168 N.W. 174. * * *

* * * * * *

"* * * Here evidence, illegal or hearsay, to be sure, was given the grand jury and the case was discussed when persons not authorized to be present were present. The minds of the jury must have considered and laid hold of the case when they heard what purported to be the facts or evidence in respect to it. On the testimony above referred to we think it clearly appears that the indictment should have been quashed.

"* * * It is supposed that witnesses only shall appear, one at a time, and give competent evidence, and upon evidence so given, and that alone, the jury are to determine whether a person should be accused of crime."

The grand jury system is deeply embedded in the criminal law in this state. The Bill of Rights in the United States Constitution and the laws of Minnesota contain provisions requiring grand jury indictments in the more serious cases. A grand jury proceeding has long been held to be basic to the rights of an accused. See McClintock, *Indictment by a Grand Jury*, 26 Minn. L.Rev. 153, for a history of the grand jury system. An indictment by a grand jury is intended for the protection of the accused, and many formal requirements have been enacted by statute to govern the procedure by which a valid indictment may be found. Among these is the requirement that an indictment must be based upon legal evidence. This provision should be construed in favor of the accused when the evidence shows a violation thereof. The difficulty is in ascertaining upon what evidence the grand jury based its decision.

In the case now before us, while the suspicion that the second grand jury was influenced by hearsay coming from

the lips of others after Anderson had confessed seems reasonable, there is no proof of it. In the nature of things, the burden of showing upon what a grand jury based its decision is a heavy one, and probably in many cases cannot be met. Obviously, if its deliberations are to remain secret, as is intended, in determining whether the indictment is based on competent evidence or not, much must be left to the trial court; and in order for us to reverse the trial court's decision after a trial and conviction, it must appear that incompetent evidence has so far influenced the grand jury that an indictment would not have been returned without it. Here, while it is true that the second grand jury, convened subsequent to Anderson's confession, returned an indictment where the first had not, it is entirely possible that Anderson's confession led to discovery of other competent evidence not available to the first grand jury. Under all the circumstances we think the trial court correctly denied the motion to quash the indictment.

HEARSAY TESTIMONY OF ALLEGED COCONSPIRATORS

2. One of defendant's principal assignments of error relates to the admission of the testimony of Morris, Sharp, Ingram, Butler, and Anderson concerning their dealings with Mastrian in his effort to procure someone to kill Mrs. Thompson. It is conceded that the admissibility of hearsay testimony of these witnesses depends upon the establishment of a conspiracy to which Thompson was a party. It must also be conceded that without the hearsay testimony of these witnesses the conviction of Thompson would be difficult to sustain.

The rule under which such testimony becomes admissible once a conspiracy is established is probably as well stated in State v. Dunn, 140 Minn. 308, 317, 168 N.W. 2, 6, as anywhere. The facts in that case are strikingly similar to those

here so far as execution of the crime is concerned. We there said:

> "* * * [A] conspiracy being established, the acts and declaration of any one of those in the conspiracy, made thereafter in the furtherance thereof, is proper evidence in the trial of any one of the coconspirators, whether present or absent. [Citations omitted.] The crime for which appellant was being tried was murder and not conspiracy; but the existence of a conspiracy to murder was an evidentary fact tending to prove appellant's connection with the crime charged. It was not therefore necessary to prove the conspiracy beyond a reasonable doubt, prima facie proof was all that was required to let in evidence of a coconspirator's acts and declaration, done or made in furtherance of the common purpose, to implicate any other coconspirator."

The same rule is followed in State v. Evans, 88 Minn. 262, 92 N.W. 976; State v. Tennyson, 212 Minn. 158, 2 N.W.2d 833, 139 A.L.R. 987; State v. Connelly, 249 Minn. 429, 82 N.W.2d 489; State v. Guy, 259 Minn. 67, 105 N.W.2d 892. The distinction must be kept in mind between proving a conspiracy as a crime, where proof beyond a reasonable doubt would be required, and establishing a conspiracy as a prerequisite to the admission of statements of alleged coconspirators, where a prima facie showing is sufficient. State v. Guy, 259 Minn. 75, 105 N.W.2d 899.

The responsibility for determining whether a conspiracy has been sufficiently established to admit hearsay statements of coconspirators rests in the first instance with the trial court. State v. Guy, supra.

The conspiracy need not be, and seldom is, established by direct proof. The existence of the conspiracy may be inferred from other proven facts and circumstances. State v. Kahner, 217 Minn. 574, 15 N.W.2d 105, certiorari denied,

323 U.S. 768, 65 S.Ct. 121, 89 L.Ed. 614. It may be proved by circumstantial evidence. Nathan v. St. Paul Mutual Ins. Co., 251 Minn. 74, 86 N.W. 2d 503. See, also, Nilva v. United States (8 Cir.) 212 F.2d 115. The existence of a conspiracy may not be proved by the hearsay statements of the alleged coconspirators, and ordinarily such statements should not be admitted until a prima facie showing of the existence of a conspiracy is made, but some latitude must be allowed the trial court in determining the order of proof. Nathan v. St. Paul Mutual Ins. Co. supra; 3B Dunnell, Dig. (3 ed.) § 1566a.

Where an examination of the record as a whole shows facts from which the trial court could reasonably infer the existence of a conspiracy, the case ought not to be reversed because proof of the conspiracy came at the wrong time. Often, as here, the overt acts of the alleged coconspirators may go partly to the establishment of the conspiracy. If inadmissible statements are admitted out of order and it develops that no sufficient showing of a conspiracy has been made, the court ought to strike the statements on motion; and if the case cannot stand without them, proper relief ought to be granted at that time. See, 4 Wigmore, Evidence (3 ed.) § 1079; Annotation, 91 A.L.R.2d 1148, 1197; 16 Am. Jur. (2d) Conspiracy, § 38.

Tested by these rules, was the evidence here sufficient to establish prima facie a conspiracy? The term "prima facie" in this context is rather a nebulous one that defies exact definition. It can probably be defined only in terms of sufficient evidence to permit the trial court reasonably to infer that there existed a conspiracy. It is generally accepted that "[w]hen two or more persons agree or combine * * * to accomplish a criminal or unlawful purpose * * *, a conspiracy exists," 3 Underhill, Criminal Evidence (5 ed.) § 855.

Looking at the evidence in this case, we have, as es-

tablishing prima facie a conspiracy, the rather unusual amount of insurance taken out shortly before the murder was committed, of a type that would expire for the most part shortly after the date of the murder, and a large part of which was payable in the event of accidental death of the insured. The policies were all owned by the beneficiary. We have the defendant's affair with Jackie and his apparent desire to continue it, if we believe her testimony; his numerous contacts and telephone conversations with Mastrian; removal of a dog that might have sounded a warning, shortly before the commission of the crime; removal of a telephone that made it necessary for Mrs. Thompson to go downstairs to answer the telephone; the early appearance of defendant at his office on the fatal day and the previous day when the crime could have been committed; his stock transactions with Mastrian, resulting in a substantial loss to defendant and quite a gain to Mastrian; the locking of the front door, which was unusual; defendant's intention to withdraw $5,000 from his bank account, and the prior possession of a large amount of cash, of which $2,500 was returned to Mastrian by Mr. Connolly, without deduction of any portion thereof for the services rendered by Thompson. There is much evidence explaining many of these actions. The removal of the dog was quite satisfactorily explained by showing that new carpeting had been placed in the hall and that the dog had stained the former carpeting. Removal of the telephone was also quite satisfactorily explained by showing that due to redecorating of the home another type of telephone was desired. While there are many things that cast doubt upon some of the evidence that would go to establish conspiracy, there is enough, we think, to permit the admission of hearsay statements of the witnesses involved for the purpose of connecting defendant with the conspiracy. These statements came from the mouths of individuals who, to say the least, left

much to be desired as contemplated conspirators, even in crime, but the weight and credibility of their testimony was for the jurors, who had the chance to observe them and to evaluate the truth of what they were saying.

SEARCH AND SEIZURE

3. The police arrived at the Nelson home, where Mrs. Thompson had gone for help, at about 9:15 a.m. After they learned who she was, they entered the Thompson home to search for a possible assailant. Finding no one, they left the house. About an hour later, other officers from the police department, including a criminologist, entered the Thompson house and made a thorough search of it. They found and removed certain items of property, including broken pieces of plastic that turned out to have come from the grip of the gun used to beat Mrs. Thompson; three cartridges for the gun of the same type as was used; a rubber hose; certain items of clothing; a jewel case; and a ring. They took numerous photographs of the interior of the house while there.

Defendant, prior to trial, moved to suppress this evidence as illegally seized in contravention of the Fourth and Fourteenth Amendments to the United States Constitution and art. 1, § 10, of the Minnesota Constitution. The motion was denied.

At the time of the search and seizure, defendant was not suspected of any complicity in the crime. The parts of the gun found on the premises ultimately led to the apprehension of Anderson. His subsequent confession may have led to the charge brought against Thompson but at the time the search was conducted Thompson voiced no objection to it but on the contrary showed every indication of the desire to assist in the apprehension of the perpetrator of the crime.

The law of search and seizure has a long and interesting

history and continues to develop and to be revised substantially from time to time. Without undertaking a comprehensive review of the decisions pertaining to this development, a reference to a few may be of help in coming to the proper conclusion as to whether the evidence seized here should have been suppressed.

Originally at least, the constitutional proscription against unreasonable searches and seizures was intended to prevent the invasion of a person's right to privacy in his home and effects. The original concept of the rule against unreasonable searches and seizures is probably best articulated in Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, where, after reviewing preceeding authorities, including the English case of Entick v. Carrington, 19 How.St.Tr. 1029, in which Lord Camden stressed the inviolability of a person's property, Mr. Justice Bradley said (116 U.S. 630, 6 S.Ct. 532, 29 L.Ed. 751):

> "The principles laid down in this opinion [Entick] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his

private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that indictment. * * *

"Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures?"

The basic doctrine stated in Boyd was reiterated in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652.

While the Fourth Amendment originally protected against the invasion of the right of privacy, later cases have sought means of enforcing the right by deterring officials from violating the rule and by the extension to state criminal trials of exclusionary rules originally applicable only to Federal prosecutions. Thus, in Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed. 1669, 1677, we find the court overruling the former doctrine that evidence obtained by state agents in an unreasonable search and seizure was admissible in a Federal criminal trial, where no Federal agent participated in the search and seizure.

The court there said:

"* * * The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, the court overruled Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, which had held that the exclusionary rules applicable in Federal

prosecutions did not apply to state criminal prosecutions. In so doing, the court said (367 U.S. 660, 81, S.Ct. 1694, 6 L.Ed.2d 1093):

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

Finally, in Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, the court held that the question of reasonableness of a state search and seizure is governed by Federal constitutional standards as expressed in the Fourth Amendment and the decisions of the United States Supreme Court construing that amendment. There is therefore, no longer doubt that in determining whether there was an unlawful search and seizure we must apply the present concepts of Federal constitutional law as expressed by the Supreme Court of the United States.

We come then to the question of whether defendant had standing to protest the use of the evidence seized. In

Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145, 148, the court said:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted. See Carroll v. United States, 267 U.S. 132, 158, 45 S.Ct. 280, 69 L.Ed. 543, 39 A. L.R. 790; Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A.1915B, 834. The legality of arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests."

Should the rule be otherwise if, before the officers arrive, the perpetrator of the crime escapes, especially if the owner or occupant of the premises searched voices no objection to a search for evidence of the crime, who committed it, and the circumstances surrounding its commission? If he voices no objection to such a search, can the occupant of the premises searched later object if the search leads to the discovery of evidence that identifies the perpetrator of the crime, who in turn implicates the occupant of the premises and charges him with complicity in the crime? We would think that if the search and seizure is lawful when made, it remains so, even though the occupant could have objected and required a search warrant at the time the search was conducted. A search warrant under the circumstances of this case would be a useless formality and in some such cases would impose an impossible impediment to investigation of a crime. There is no invasion of privacy where the search is with the express or tacit consent of the one who has the right to object.

With respect to the right of the occupant of a house to complain of unlawful search and seizure, the court in Agnello said (269 U.S. 32, 46 S.Ct. 6, 70 L.Ed. 149):

"While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. [Citations omitted.] The production of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant."

This language should, however, we think be construed in relation to the basic purpose underlying the constitutional proscription against unreasonable searches and seizures—that is, to protect against unlawful invasion of the privacy of a person's home or effects.

At the time of the search and seizure, the officers did not know for whom they were looking. They did not at that time suspect defendant of any complicity in the crime. The search was conducted as part of an investigation to ascertain who the assailant of Mrs. Thompson was. While there is no evidence of defendant's express consent to a search of his home, neither is there evidence of any objection. What evidence there is in the record indicated that he at least tacitly consented to the search and indicated his desire to cooperate with the officers in finding Mr. Thompson's assailant. At that time there was no invasion of his privacy. The seized articles which became important in the trial were not even owned by him. They were instruments left by the perpetrator of the crime when he escaped from the house and were brought to the scene by him. The search was wholly incidental to an investigation of the crime and

an attempt to ascertain who had committed it. In Jones v. United States, 362 U.S. 257, 267, 80 S.Ct. 725, 734, 4 L.Ed.2d 697, 706, the court said:

> "* * * [A]nyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

The case now before us does not present the dilemma posed in Jones, where to admit ownership of narcotics seized so as to establish standing to assert illegality of its seizure would be an admission of guilt and undoubtedly result in conviction. Anderson was not on the premises lawfully and the evidence seized was used only to corroborate his testimony as the perpetrator of the killing.

If the prosecution had remained against Anderson alone, we think no one would question the validity of this search and seizure. He was clearly a trespasser. He had no right to be in the house and we doubt that he would have any standing to question the validity of the search and seizure made in investigating his crime. When, eventually, defendant was accused of complicity in the crime, it would seem that he could not then retroactively question the search which initially he had, at least tacitly, condoned. We think the evidence here sufficiently shows authorization of the search by the one entitled to object to it so that it cannot be said that the search and seizure were unreasonable.

Nor do we think United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59, is in conflict with this conclusion. In that case the officers were searching for and seized property claimed by the defendant. To be sure, he was not the occupant of the premises where the goods were found, but he had a right to use the premises; he was not a trespasser. In such circumstances, he had standing

to object to the search and seizure. Here Anderson had no such right, and defendant did not assert it at the time he should have if he had any objection. The search and seizure were unlawful at the time made in Jeffers. The opposite is true here.

In Jones v. United States, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697, 702, relied upon by the state, the court said:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy. * * * To establish 'standing,' Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."

The court then points out the fallacy in requiring possessory interest in the premises and nullifies that requirement by saying (362 U.S. 267, 80 S.Ct. 734, 4 L.Ed. 2d 706):

> "* * * No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."

Taken literally, this language might be construed to mean that defendant could challenge the legality of the search and seizure at any time he was accused of the crime, even though he had not objected to the search and seizure when

made. However, we think that would be going too far. The police officers ought to be given an opportunity to investigate a crime; and where the occupant of the premises permits a search to be made in order to ascertain who the perpetrator of the crime was, he should not thereafter be permitted to claim that objects found as a result of the search that are used in prosecution of the crime should be suppressed as the product of an unlawful search and seizure. Permitting the officers to make a search without a warrant at a time when the occupant of the premises is not even suspected of the crime lulls them into security. Thereafter excluding the objects obtained thereby on the ground that the search and seizure were unlawful is obviously unfair. After all, we get back to the basic reason for the constitutional proscription—protection from unlawful invasion of a person's home or effects; if there is no such unlawful invasion, the evidence ought not to be excluded.

Our decisions in State ex rel. Branchaud v. Hedman, 269 Minn. 375, 130 N.W.2d 628, certiorari dismissed, 381 U.S. 907, 85 S.Ct. 1456, 14 L.Ed.2d 289, and State v. Harris, 265 Minn. 260, 121 N.W.2d 327, certiorari denied, 375 U.S. 867, 84 S.Ct. 141, 11 L.Ed.2d 94, are cited by both parties in support of their respective contentions. We do not think the cases are of much help here. The object of the search in both cases was an automobile, and there was reasonable ground to believe that defendant was involved in illegal activity. We were able to find consent for the search in the Branchaud case and in the Harris case relied on the distinction frequently drawn between search of an automobile and search of a home. An automobile is a movable object and frequently, if it is not searched when found, search will be of no avail. That is not true of a home, and the requirements for a search warrant, if a

home is to be invaded, should be more strictly applied than if an automobile is the object of the search.

3a. The state also contends that inasmuch as defendant did not object to the introduction of the items seized by the officers at the trial he cannot be heard to object to their admission now on appeal. The state relies on State, by. Burnquist, v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278, for the proposition that the court will not review objections made for the first time on appeal.

Defendant moved to suppress the evidence prior to trial. The motion was denied. He also moved to strike the exhibits taken from his home and the testimony of the criminologist who conducted the search. It would seem that where a motion to suppress is made prior to trial and denied a defendant has sufficiently preserved his record for appeal. He should not be compelled to thereafter object to the introduction of each item of evidence. He has brought his objection to the attention of the court and the court has ruled on it and that should be all that is necessary in order to preserve the objection for review. This is particularly true since the adoption of L.1963, c. 850 (Minn.St. 626.21).

DEFENDANT'S RIGHT TO PRETRIAL STATEMENTS OF PROSECUTION WITNESSES (THE JENCKS RULE)

4. The state called as one of its witnesses Floyd Peterson, an insurance agent. After he had been examined by the prosecution, defendant's counsel requested that he be permitted to examine a pretrial written statement made by the witness. The trial court ruled that he would examine the statement in camera to ascertain whether it was inconsistent with the testimony of the witness. Having done so he found there was no inconsistency and refused to permit defendant to have the statement. As to all other witnesses where such demand was made, the court ex-

amined the pretrial statements, and after inquiring of the prosecuting attorney whether there was any public policy against showing the statements to defendant's counsel and receiving a negative answer, ruled that they be furnished to the defendant. Defendant assigns as error the refusal of the trial court to permit him to see the Peterson pretrial statement, as well as the manner in which the other statements were handled.

We have no controlling decision in Minnesota on this question. We did come close to it in State v. Boerner, 267 Minn. 539, 127 N.W.2d 555. Prior to Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, decided June 3, 1957, the courts were widely split as to how such pretrial statements should be handled. It is difficult to reconcile even the decisions of the United States Supreme Court. Compare, for instance, Gordon v. United States, 344 U.S. 414, 77 S.Ct. 369, 97 L.Ed. 447, and Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322. It would serve no useful purpose to discuss the cases prior to Jencks. In the Jencks case the court held a defendant was entitled to such pretrial statements without first establishing a conflict. The court said (353 U.S. 666, 77 S.Ct. 1012, 1 L.Ed.2d 1111):

"* * * We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.

* * * * * * * * * * * * *

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the

events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

"Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. 'For the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done * * *.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.

"'* * * We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.''

Mr. Justice Clark, in a dissenting opinion, stated (353 U.S. 681, 77 S.Ct. 1020, 1 L.Ed.2d 1119):

"Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well

close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets. This may well be a reasonable rule in state prosecutions where none of the problems of foreign relations, espionage, sabotage, subversive activities, counterfeiting, internal security, national defense, and the like exist, but any person conversant with federal government activities and problems will quickly recognize that it opens up a veritable Pandora's box of troubles."

Congress did react promptly to the Jencks decision, and on September 2, 1957, enacted Pub.L. 85-269, 71 Stat. 595, now coded as 18 U.S.C.A. § 3500, which to some extent circumscribes the effect of the Jencks decision.[1]

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[1] "§ 3500. Demands for production of statements and reports of witnesses

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the object of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of

The history of the enactment of this statute is to be found in Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287. Apparently the statute was intended to permit the trial court to excise parts of the statement not relevant to the witness' testimony.

Since the Jencks case was decided under the supervisory power of the United States Supreme Court over Federal courts, Palermo v. United States, supra, it is not binding on the state courts. It has, however, led to a consideration and reconsideration of the problem by many of the state courts. As far as our research goes, it shows that they are about evenly divided as to whether they will follow the Jencks rule or not. So far as we have been able to determine, ten states now follow the Jencks rule and eleven reject it. Of the eleven states rejecting the Jencks rule, it would appear that nine do so, at least in

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the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) . If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof, as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

part, because they were following precedents, holding that the trial court had discretion in this particular area, and most of them seek to justify the rejection of Jencks on the basis that it was merely an exercise of the United States Supreme Court's supervisory powers over criminal procedure in the lower Federal courts. See, Mabry v. State, 40 Ala.App. 129, 110 So.2d 250; State v. Pikul, 150 Conn. 195, 187 A.2d 442; Anderson v. State, 239 Ind. 372, 156 N.E.2d 384; State v. Hill, 193 Kan. 512, 394 P.2d 106; McKenzie v. State, 236 Md. 597, 204 A.2d 678; State v. Aubuchon (Mo.) 381 S.W.2d 807; Erving v. State, 174 Neb. 90, 116 N.W.2d 7; Gaskin v. State, 172 Tex.Cr. 7, 353 S.W.2d 467; State v. Robinson, 61 Wash.2d 107, 377 P.2d 248. The other two states apparently rejecting the Jencks rule also base their decisions largely on the fact that the Jencks decision was merely an exercise of the Supreme Court's supervisory powers over the lower Federal courts. State v. Kelly, 249 Iowa 1219, 91 N.W.2d 562; Anderson v. State, 207 Tenn. 486, 341 S.W.2d 385.

It would seem that in most of the above cases the question facing the court was whether it should overrule an established precedent merely because the Supreme Court had done so in the Federal courts. They chose not to do so. Here the question is an open one, and we have our choice of adopting the rule which we think will best serve the interests of justice in this state.

Of the ten states that have adopted the Jencks rule it seems that only two can be said to have overruled previous decisions of their state courts. People v. Wolff, 19 Ill.2d 318, 167 N.E.2d 197; People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E.2d 881. In the other decisions adopting the Jencks rule the decision was either in line with earlier decisions or a case of first impression in that state. State v. Saenz, 88 Ariz. 154, 353 P.2d 1026; People v. Chapman, 52 Cal.2d 95, 338 P.2d 428; State v.

Hutchins, 1 Stoney 100, 51 Del. 100, 138 A.2d 342; Walker v. State, 78 Nev. 463, 376 P.2d 137; State v. Hunt, 25 N.J. 514, 138 A.2d 1; Commonwealth v. Smith, 412 Pa. 1, 192 A.2d 671; State v. Lavallee, 122 Vt. 75, 163 A.2d 856; State v. Richards, 21 Wis.2d 622, 124 N.W.2d 684.

Some indication appears from the decisions of other states as to what they may do when clearly confronted with the problem. It would appear that in two states the Jencks rule will be followed. State v. Morgan, 67 N.Mex. 287, 354 P.2d 1002; Chandler v. State, 230 Or. 452, 370 P.2d 626. Two states may have implicitly adopted the discretionary rule. Russom v. State (Fla.App.) 105 So.2d 380; State v. Miller, (Ohio App.) 176 N.E.2d 296. If indulging in speculation of this kind is of any value, it might appear that three states are likely to repudiate Jencks. State ex rel. Regan v. Superior Court, 102 N.H. 224, 153 A.2d 403; State ex rel. Sadler v. Lackey (Okla. Cr.) 319 P.2d 610; State v. Di Noi, 59 R.I. 348, 195 A. 497. A pre-Jencks opinion may have committed one state to the discretionary rule, Battalino v. People, 118 Colo. 587, 199 P.2d 897; and a post-Jencks opinion in another state has adhered to its prior rule without expressly repudiating Jencks. Bellew v. State, 238 Miss. 734, 106 So.2d 146. We have no way of knowing what some of these states will do upon a reconsideration of former rules in the light of the Jencks decision and decisions from other jurisdictions made after Jencks.

The court in People v. Wolff, supra, after a careful analysis of alternative views, said (19 Ill.2d 327, 167 N.E. 2d 201):

> "Whether to adopt the Federal view or to retain the traditional view that the delivery of documents to an accused rests in the discretion of the trial judge in any case, presents a difficult choice. While the Federal rule is one of procedure, and therefore not

binding before us, it is at the same time the latest and most thorough approach to the problem."

In the case of State v. Hunt, supra, the New Jersey court said (25 N.J. 530, 138 A. 2d 10):

"In the instant matter the county prosecutor contends that the Jencks case is not binding upon us since it was not a constitutional holding but was an exercise of the court's control over the administration of federal justice. [Citations omitted.] Assuming that to be so, it still has persuasive force and its underlying principle of broad disclosure is particularly apt in state prosecutions where there is ordinarily no countervailing consideration resting on national security."

Having reviewed the cases on this subject we are convinced that adoption of the Jencks rule is in line with the modern tendency to afford a defendant in a criminal trial a fair opportunity to defend himself. If a prosecution witness has made a pretrial statement, why should not the defendant have a chance to see it? If the object is to search for the truth, any inconsistency in such statement might well have the desired result of finding out where the truth lies. We are convinced that the cases following the Jencks rule are the most persuasive and the most enlightened view on this subject today. We therefore now hold that after a witness testifies for the prosecution an accused person has the right to examine unprivileged pretrial statements of the witness [2] for the purpose of determining whether he wishes to use it for impeachment purposes, with-

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[2] Statements producible under the Jencks Act are defined in subsection (e). See footnote 1, supra. We are dealing here only with statements that fall clearly within (e) (1). We leave for future determination what other statements of a witness may be within the meaning of the rule we adopt. See Annotation, 5 L.Ed.2d 1014, 1025, where the Federal cases are collected.

out laying any further foundation than that such statement has been made. If the prosecution objects to the statement on the ground of relevancy, the court, in camera, will decide whether the statement is relevant; and if it finds that the whole or a part thereof is not relevant to the testimony of the witness, it shall excise such part as is not relevant, retaining it, however, as a part of the record so that upon review the correctness of the court's ruling may be determined.

Fortunately the court did turn over to the defendant all pretrial statements except that of Peterson. We have examined the testimony of Peterson in the record and are convinced that even though, in the light of the rule which we now adopt, there may have been error, looking at the matter retrospectively, no substantial prejudice resulted to the defendant.[3] Even if we assume that Peterson's testimony was impeached, we doubt that it would seriously affect the outcome of the case. The trial court did examine the statement and found no inconsistency between it and the testimony. We are content to leave it there.

MISCONDUCT OF JUROR

5. Shortly prior to the submission of the case to the jury, the trial court and counsel for defendant, received a call from an attorney in Minneapolis, not connected with the trial, informing the court and counsel that either at a dinner or at a party he had a conversation with the owner of Midwest Patrol, which is a security agency in St. Paul, in the course of which it was related to him that the sales manager for the Midwest Patrol was related to one of the jurors and that at a dinner with the sales manager there was a comment made by the juror to the effect that "what

[3] The rule of harmless error should apply. See, Rosenberg v. United States, 360 U.S. 367, 79 S.Ct. 1231, 3 L.Ed.2d 1304; Karp v. United States (8 Cir.) 277 F.2d 843.

is coming out in the trial does not compare with what has appeared in the newspapers."

A hearing between counsel and the court was held in chambers, prior to a discussion of the charge to be given to the jury, in which this matter was discussed. The court indicated that the report was so vague that it did not warrant any action in the absence of a specific motion. No such motion was forthcoming and the case continued to completion.

This alleged misconduct of the juror has now been included as one of the grounds for which defendant seeks a new trial.

This whole subject is so exhaustively covered in Annotation, 31 A.L.R.2d 417, that it would be useless to discuss it in detail here. Our attention has been called to five decisions in which we have considered similar questions, namely, State v. Williams, 96 Minn. 351, 105 N.W. 265; State v. Lilja, 155 Minn. 251, 193 N.W. 178; State v. Soltau, 212 Minn. 20, 2 N.W.2d 155; State v. DeZeler, 230 Minn. 39, 41 N.W.2d 313, 15 A.L.R.2d 1137; and Gruenhagen v. Brelje, 252 Minn. 203, 89 N.W.2d 738.

These cases, and we think it is the general rule followed elsewhere, establish the proposition that before the fact that a juror may have read a newspaper article discussing certain aspects of the case will furnish the basis for a new trial it must appear (1) that the juror did read such article and was influenced thereby to the prejudice of the defendant; and (2) that, having knowledge of the fact prior to the submission of the case to the jury, the defendant requested appropriate action by the court.

If, having knowledge of the alleged mis-conduct, defendant chooses nevertheless to proceed with the trial to completion, it must be held that he has waived the irregularity.

The same rule is followed here as with respect to other misconduct of the jury. Whether a new trial should be

granted or not rests largely in the discretion of the trial court, who has an opportunity to ascertain whether any prejudice has resulted. See, Ceylon Farmers Elevator Co. v. Fidelity & Deposit Co., 163 Minn. 280, 203 N.W. 985; State v. Warren, 201 Minn. 369, 276 N.W. 655; State v. Rediker, 214 Minn. 470, 8 N.W.2d 527; Eichten v. Central Minn. Co-op. Power Assn., 224 Minn. 180, 28 N.W.2d 862.

On the showing made here it seems obvious that the court was correct in denying the new trial on this ground.

DENIAL OF FAIR TRIAL

6. Defendant contends he has been denied a fair trial due to local prejudices created by unfair publicity given the case prior to trial. On an application by defendant for mandamus, we required a change of venue from Ramsey to Hennepin County. State v. Thompson, 266 Minn. 385, 388, 123 N.W.2d 378, 381. In so doing, we noted:

> "* * * Probably no case in the memory of anyone in this locality has arounsed so much interest and so much discussion as this one. Over a period of several months hardly a day has elapsed when something has not been said or written in a news medium of one kind or another. It is important that the constitutional guaranty of freedom of the press not be curtailed if we are to exist as a free people. It is equally important, however, that, when the unrestrained exercise of this right clashes with the right of an accused person to be tried by an impartial jury having no preconceived opinion as to the guilt or innocence of the accused, the rights of such accused person must be protected by transferring the case to a locality where the public may not have been influenced as much by the publicity that has been given the case."

Ordinarily a defendant on motion for change of venue does not have a right to select a particular county for his

trial, but it is left to the trial court to choose a county in which a fair trial can be obtained. In this case, however, defendant was granted a change to Hennepin County at his request. It cannot be denied that the case was given an unusual amount of publicity, much of which could better have been omitted. The day may come when in this country we find a way to strike a fair balance between the constitutional guaranty of a free press and the constitutional right to a fair trial. It seems that we have not yet found a solution to that problem. The only safeguard now in existence is the self-restraint of news media, of which there seems to be a short supply in a case so packed with emotional appeal as this one. Until some better safeguard is available, about all we, as courts, can do is to scrutinize the record to ascertain as best we can whether a defendant has been deprived of a fair trial as the result of unfair publicity given the case. We agree with the conclusion of the New Jersey court in State v. Van Duyne, 43 N.J. 369, 204 A.2d 841, that attorneys, both prosecution and defense, who publicly discuss the case and are quoted in the news media, particularly with respect to expressions of opinion as to guilt or innocence of the defendant, ought to be dealt with promptly by the court. Police officers, over whom we have no such disciplinary power, ought likewise to be dealt with by their superior officers to the end that criminal cases may be fairly tried in court and not in the news media.

It is doubtful in this case that a more fair trial could have been obtained elsewhere in this state. The same news coverage extended throughout the state as in Ramsey and Hennepin Counties. The case was one of public interest everywhere. We do not have a record of the voir dire examination of the jurors but are willing to accept counsel's statement that of some 112 jurors examined 67 expressed actual bias. That does not mean, however, that the 12 accepted were also biased.

Minn.St. 627.01 provides that a party accused of crime shall be entitled to one change of venue only. This provision is not so binding on the courts, however, that a further change cannot be granted if and when it affirmatively appears that a fair trial cannot be obtained in the county to which the venue is changed. A defendant accused of crime is entitled to a fair trial, which right cannot be circumscribed by any such limitation. But some responsibility rests on the defendant as well. Here no further request was made for a change from Hennepin County. Apparently defendant was satisfied with the place of trial until the jury decided adversely to him. On the record before us we cannot say he was denied a fair trial, nor are we convinced that a more fair trial could have been obtained elsewhere in the state. Criminal cases must be tried somewhere and, having gone as far as we did in this case in permitting the defendant to choose his own county, we do not know what more we could have done.

This is not a case like Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, where much of the unfair publicity came out of televising the trial itself. Here the prejudice, if there was any, was created mainly by publicity prior to the time the trial began. If it is assumed that a fair jury was selected, we doubt that any publicity from that time on created any prejudice against the defendant. The danger is that the prejudice was created before the case started so that a fair jury could not be obtained. The experienced trial judge in this case did everything possible to insure a fair trial after it began.

SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION

7. Defendant contends the evidence taken as a whole does not sustain a conviction. His contention is predicated largely upon the assumption that the hearsay testimony of Anderson, Morris, Sharp, Ingram, and Butler should

not have been admitted, and that in the absence of this testimony the case rests entirely upon circumstantial evidence which is insufficient to sustain the conviction.

We must concede that in the absence of the testimony of these witnesses it would be difficult to sustain the conviction of Thompson to the crime, but we have already held that this testimony was admissible. On appeal we are governed by the same rules as in any other case. In State v. Norgaard, 272 Minn. —,—, 136 N.W.2d 628, 631, we said:

> "In passing upon the weight and sufficiency of the evidence we can only repeat that the scope of our review is limited to ascertaining whether under the evidence contained in the record the jury could reasonably find the accused guilty of the offense charged. If the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that defendant was proven guilty of the offense charged, a reviewing court will not disturb its verdict."

See, also, State v. Markuson, 261 Minn. 515, 113 N.W.2d 346.

We are also governed by the rule that on appeal this court must take the evidence most favorable to the state and must assume that the jury believed the state's witnesses and disbelieved anything which contradicted their testimony. State v. Homme, 226 Minn. 83, 32 N.W.2d 151; State v. Schabert, 222 Minn. 261, 24 N.W.2d 846, 31 Minn. L.Rev. 375. The credibility of the witnesses was clearly for the jury. While the character of the state's witnesses leaves much to be desired, if the jury believed them, as we must assume it did, their testimony, coupled with the circumstantial evidence corroborating it, is sufficient to sustain the verdict. It is true that much of the testimony relied upon by the state comes from accomplices, which must be

corroborated under § 634.04 before it can be accepted; but there is much by way of corroboration that we need not detail here. It is sufficient to say that in the light of all the evidence we cannot hold that the evidence is insufficient to sustain the verdict.

NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE

8. We come then to the final and we think one of the important claims of the defendant, namely, that the trial court should have granted his motion for new trial based on newly discovered evidence.

After the conviction of defendant and the subsequent conviction of Mastrian, Anderson entered a plea of guilty to murder in the first degree. He, together with Thompson and Mastrian, was incarcerated in the Stillwater prison. The other witnesses linking Thompson to the crime—Morris, Sharp, Ingram, and Butler—after having been kept in jail for over a year on one charge or another, were all released after the two cases were over. Morris, who was charged with being an accessory after the fact, entered a plea of guilty and the sentence was suspended, with probation for 5 years. Ingram, who entered a plea of guilty to robbery in the first degree, was sentenced, and his sentence suspended. Sharp was held on a charge of burglary in the third degree but the charge was dismissed on motion of the county attorney. Butler was permitted to plead guilty of attempted robbery in the first degree and a 10-year sentence imposed was stayed and he was placed on probation. Anderson, who insisted, even to the end, that he understood he was to be permitted to plead guilty to murder in the second degree and that he would not have to serve over 5 or 6 years, finally entered a plea of guilty to murder in the first degree.

After an appeal had been perfected to this court by defendant, prison authorities found on the person of Ander-

son a partially completed letter addressed to the governor of Minnesota and the chief justice of the supreme court, in which he repudiated his entire testimony at the trial and completely exonerated Thompson and Mastrian. Anderson was thoroughly examined at the prison by counsel for defendant and under oath reiterated what he had stated in this letter. He stated that Thompson and Mastrian had nothing to do with the crime but that it was the result of an attempted burglary by him alone. Shortly thereafter he was removed from Stillwater prison and we remanded the case to the trial court for hearing as to whether a new trial should be granted on the ground of newly discovered evidence. At the full hearing, in which Anderson was examined and cross-examined, he then repudiated the statement made at the prison and testified that what he had said at the trial was true. His explanation was that threats had been made on his life by Mastrian in the prison and other threats had come to him from Thompson through other inmates of the prison, and that he wrote the letter and gave the statement to defendant's counsel under oath for fear that these threats would be carried out if he did not do so.

It is apparent that Anderson has little regard for the truth and less for the sanctity of an oath. However, the trial court had an opportunity to observe him and to determine whether he was telling the truth at the trial and at the last hearing, or when he made his retraction in prison. We feel obliged to accept the determination of the trial court. There are discrepancies even in his latest statement, but in its essentials it does implicate Mastrian and, through him, Thompson in the commission of the crime.

Defendant cites in support of this motion the cases of State v. Myers, 154 Minn. 242, 191 N.W. 597, involving repudiation of his testimony by a key witness; State v. Star, 248 Minn. 571, 81 N.W.2d 94, involving a confession and

exoneration by a person who did not testify at the trial; State v. Warren, 252 Minn. 261, 89 N.W.2d 702, involving admission of mistaken identity; and State v. Bock, 229 Minn. 449, 39 N.W.2d 887, which involved a question again of mistaken identity and an admission by another person that he had committed crimes similar to that of which defendant was convicted. In none of these cases was there a subsequent retraction of the statements made which exonerated the defendant. That is not true here. The question here is whether Anderson told the truth at the trial and at the last hearing, or while in prison when he retracted what he had said at the trial. It may well be true that if another jury heard all of these statements they would be less likely to believe Anderson. It may also be true that if they knew of the treatment accorded Morris, Sharp, Ingram, and Butler they would discount their testimony on the grounds that they may have testified as they did as the result of promises of leniency. Be that as it may, we must take the record as we find it and, accepting the trial court's determination that Anderson fabricated the story told in prison and not at the trial, we cannot hold that the court erred in denying a new trial on the grounds of this newly discovered evidence.

Affirmed.

TERM INSURANCE POLICIES IN EFFECT ON CAROL THOMPSON'S LIFE WHEN SHE WAS MURDERED ON MARCH 6, 1963[1]

Date of Application	*Local Agent That Handled Application*	*Company*	*Amount of Insurance*	*Premium Paid*	*Type of Insurance*	*Expiration Date*
Feb. 6, 1962	James Treanor	Travelers Ins. Co.	100,000 plus 100,000 accidental death	$597.70	Term	April 9, 1967
Feb. 14, 1962	James Treanor	Travelers Ins. Co.	100,000 plus 50,000 accidental death	$547.70	Term	April 9, 1967
April 4, 1962	James Treanor	Accident Division of Travelers Ins. Co.	100,000	$110.00	Accident	April 4, 1963
April 10, 1962	Floyd Peterson	Time Ins. Co.	50,000[2]	$ 82.50	Accident	May 1, 1963
April 10, 1962	Floyd Peterson	Continental Cas. Co.	200,000[3]	$350.00	Accident	April 10, 1963
April 12, 1962	James Treanor	Lloyd's London	250,000	$312.50	Accident	April 11, 1963
May 14, 1962	John Winter	General Accident Co.	30,000[4]	$ 32.40	Accident	June 1, 1963
May 21, 1962	John Winter	Zurich Ins. Co.	25,000[5]	$ 38.75	Accident	June 13, 1963
January, 1963	John Winter	Continental Cas. Co.	50,000	$ 75.35	Accident	March 15, 1963

1. On May 23, 1962, the defendant also was issued a 180-day accident policy on Carol's life for $20,000 ($50,000 was applied for) but this policy lapsed in November 1962.
2. Coverage of $100,000 was applied for.
3. The defendant was advised in November 1962 that this policy would not be renewed.
4. Coverage of $50,000 was applied for.
5. Coverage of $50,000 was applied for.

Appendix B

STATE OF MINNESOTA, SUPREME COURT

39343 and 39702

STATE OF MINNESOTA,
RESPONDENT,
v.
T. EUGENE THOMPSON,
APPELLANT.

JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the orders and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby are in all things affirmed.

Dated and Signed January 18, 1966
BY THE COURT.
Attest:
MAE SHERMAN, *Clerk.*

Appendix C

STATE OF MINNESOTA, RESPONDENT,

v.

TILMER EUGENE THOMPSON, RELATOR.

No. 39238.

Supreme Court of Minnesota.
Sept. 13, 1963.

Wm. B. Randall, County Attorney, St. Paul, for respondent.
Kelly, Segell & Fallon, by Hyam Segell and William S. Fallon, St. Paul, for relator.

PER CURIAM.

This is an application for a peremptory writ of mandamus to compel the District Court of Ramsey County to transfer the venue of the above action from Ramsey County to Hennepin County.

It would be undesirable at this time to discuss the facts of the case in detail. It is enough to say that defendant, a prominent citizen of St. Paul, has been indicted by the grand jury of first-degree murder, it being alleged that he procured another to murder his wife.

At the outset, some legal propositions that have been raised should be disposed of.

[1] 1. Mandamus has been adopted by this court as a proper procedure to review a decision of the trial court denying a motion for a change of venue.[1]

[2] 2. In reviewing an order of the trial court by mandamus, this court will consider only those matters pre-

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[1] Miller v. Anchor Cas Co., 233 Minn. 87, 45 N.W.2d 705; State ex rel. Nesseth v. District Court, 186 Minn. 513, 243 N.W. 692.

sented to the trial court. This court sits in review and does not try the facts.[2]

[3] 3. We have long ago decided that it is proper, and often preferable, to determine the place of trial prior to the actual trial of the case rather than afterwards.[3]

[4-6] 4. Ordinarily, in determining whether the place of trial should be changed in the interests of justice, the trial court has a wide discretion and we will not disturb the exercise of that discretion unless we are convinced that a fair trial cannot be had at the place where the case ordinarily would be tried.[4] When it appears likely that it is impossible to procure a fair trial before an impartial jury in the county in which the crime was committed, the venue ought to be changed to a county in which an impartial jury can be obtained.[5]

In State ex rel. Warner v. District Court, 156 Minn. 394, 400, 194 N.W. 876, 878, we said:

> "* * * It is not necessary that convenience of witnesses and the ends of justice *require* the change. It is sufficient that they would be *'promoted.'*"

In Berry v. North Pine Elec. Co-op., Inc., 235 Minn. 562, 569, 50 N.W.2d 117, 123, we said:

> "Where there is reason to believe that it will be impossible to obtain a fair and impartial trial in the county selected because of local prejudices, feelings,

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[2] State ex rel. Minneapolis, St. P. & S. S. M. Ry. Co. v. District Court, 161 Minn. 176, 201 N.W. 298; State ex rel. Austin Mutual Ins. Co. v. District Court, 194 Minn. 595, 261 N.W. 701.

[3] Delasca v. Grimes, 144 Minn. 67, 174 N.W. 523; State ex rel. Security State Bank of Waldorf v. District Court, 150 Minn. 498, 185 N.W. 1019.

[4] State ex rel. Nesseth v. District Court, 186 Minn. 513, 243 N.W. 692; King v. Schultz, 231 Minn. 569, 43 N.W.2d 278 (other cases collected in opinion).

[5] See, Berry v. North Pine Elec. Co-op., Inc., 235 Minn. 562, 50 N.W.2d 117.

and opinions, the ends of justice require that a change of venue be granted."

The governing statute is Minn.St. 627.01, which reads:

"Every criminal cause shall be tried in the county where the offense was committed, except as otherwise provided by law, unless it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the same shall be pending, if the offense charged in the indictment is punishable with death or imprisonment in the state prison, may direct the person accused to be tried in some other county, in the same or any other judicial district in the state, where a fair and impartial trial can be had; but the party accused shall be entitled to one change of venue only."

[7] The claim here is that so much publicity has been given to this case that it is impossible to obtain an impartial jury in Ramsey County. Courts can do little to restrain news media from printing or broadcasting what they claim is news, but, when it appears that the public has been subjected to so much publicity about a case that it seems unlikely that a fair trial can be had in the locality in which the trial normally would be held, the court can and should see to it that the trial is transferred to another locality in which it is more probable that a fair trial can be had. Probably no case in the memory of anyone in this locality has aroused so much interest and so much discussion as this one. Over a period of several months hardly a day has elapsed when something has not been said or written in a news medium of one kind or another. It is important that the constitutional guaranty of the freedom of the press not be curtailed if we are to exist as a free people. It is equally important, however, that, when the unrestrained exercise of this right clashes with the right

of an accused person to be tried by an impartial jury having no preconceived opinions as to the guilt or innocence of the accused, the rights of such accused person must be protected by transferring the case to a locality where the public may not have been influenced as much by the publicity that has been given the case.

In Irvin v. Dowd, 366 U.S. 717, 730, 81 S.Ct. 1639, 1647, 6 L.Ed2d 751, 760, this thought was expressed by Mr. Justice Frankfurter in a concurring opinion, where he said:

> "* * * This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived."

[8]. The vice of the publicity given this case is not in printing or disseminating factual news but in printing and broadcasting what purports to be the opinions of people who are supposed to know the facts. A few samples of these statements will suffice to show the nature thereof. In one newspaper, a statement chargeable to Lt. George Barkley, head of the police homicide unit, stated that "the big fish—the one who is paying the bills and who engineered it from the beginning—remains to be caught." In a later story, an unnamed police official was reported as having said with regard to the person believed to have planned the murder: "We could have arrested this man weeks ago but we don't want to arrest him until our case is so overwhelmingly concrete it leaves no possible chance for acquittal in a courtroom."

In another statement in which the insurance carried by defendant on the life of his wife was discussed, the chief of police of St. Paul was quoted as having said: "I said it seems clear that the Thompson murder case is one of murder for profit."

5. In view of the added publicity that undoubtedly will be given to this decision, it is not desirable that we further

discuss statements we believe have created a prejudicial atmosphere within Ramsey County. We have examined the numerous newspaper articles that were submitted to the trial court, and we are convinced that many of them are of such a nature that it is highly unlikely that an impartial trial can be obtained in Ramsey County.[6]

[9, 10] 6. The motion in this case is for a change of venue to Hennepin County. The state argues that if it is impossible to obtain a fair trial in Ramsey County it is equally unlikely that an impartial jury can be obtained in Hennepin County. There is much merit to this argument. However, defendant himself has chosen Hennepin County as a place where he believes he can obtain as fair a trial as can be obtained anywhere. Ordinarily it is not permissible for a defendant, on a motion for change of venue, to select the county to which the venue should be changed. That is a matter that rests largely in the discretion of the trial court, who, having found that a fair trial cannot be obtained where the crime was committed, should decide what county in the state is most likely to afford a fair trial. In view of the fact that in this case defendant has selected Hennepin County in his motion for a change of venue, we are inclined to grant his request rather than to send the case back to the trial court for a determination by it of the proper county to which the case should be transferred.

It is therefore ordered that the writ of mandamus issue as prayed for.

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[6] The recent decisions of the United States Supreme Court indicate the necessity for granting a change of venue when publicity has reached a point where it is unlikely that an impartial jury can be obtained in the locality in which the case normally would be tried. See, for instance, Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L.Ed.2d 663; Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed 2d 751; Janko v. United States, 366 U.S. 716, 81 S.Ct. 1662, 6 L.Ed 2d 846, the facts of which are found in Janko v. United States (8 Cir.), 281 F.2d 156.

Appendix D

NEWSPAPER EXTRACTS

A1 "Most Slayings Involve Kin or Associates'"

Murder is largely an affair of "relatives, friends, and associates," a sociologist said today. . . .

. . . .A survey of England and Wales between 1900 and 1949 showed "that in at least 72.4 per cent of the cases, the victim and the convicted murderer were related by blood or marriage or knew each other sufficiently well to get involved in an emotional relationship.

(*St. Paul Dispatch*, March 22, p. 1)

A2 "Thompson asks to Testify in Wife's Murder"

According to St. Paul police, Mastrian was only a "middle man" and a fourth man masterminded the murder conspiracy. Lt. George Barkley of the homicide division says police know who the fourth man is, and that he will be arrested "when our case is so overwhelmingly concrete it leaves no possible chance of acquittal in a courtroom."

(*Pioneer Press*, April 30, pp. 1-2)

A3 "Police Pondering Final Moves in Thompson Case"

The final hand in a high-stakes poker game police are playing in the Thompson murder case may result in the immediate arrest of the man authorities say planned, ordered and paid for the killing March 6 of 34 year old Carol Thompson.

The Pioneer Press learned Sunday police have what they consider to be "air-tight cases" against three men now facing first degree murder charges.

The three, Norman Mastrian, 39, Sheldon Morris, 34, and Dick W. C. Anderson, 35, are considered to be the principal actors in the drama, but the director and producer, who police say had 10 months, perhaps longer, to plan his macabre tragedy is the man they want most.

His arrest is expected at any time, according to police but he remains free mainly because his conviction is considered to be "absolutely essential" to a complete solution of the stabbing death of the attractive mother of four, and wife of Attorney T. Eugene Thompson.

"We could have arrested this man weeks ago", one official said, "but we don't want to arrest him until our case is so overwhelmingly concrete it leaves no possible chance for acquittal in the courtroom. . .

. . . .It is reliably learned Sunday night that at least one of the suspects now in custody is giving serious thought to the advantages of testifying as a witness for the state.

The prospects of getting one of the three men now charged with first-degree murder to name the man who police say ordered the killing of Mrs. Thompson has reportedly placed the county attorney's office on the horns of a dizzying dilemma.

Should they proceed with their plans to try all three for first-degree murder, and spurn all offers for the testimony one of the men may supply in exchange for a reduction of the charge against him? Or should they reduce the charge in return for testimony they feel will make the case they already have against the prime suspect one they believe will be air-tight?

The authorities who have handled the case during the intensive investigation thus far, feel they have nothing to lose and everything to gain by accepting the cooperation of one of the three men now charged with the murder. The question they now must answer is "Who is the more

important, one of the pawns in the case, or the man who masterminded it and moved the pawns.
(*St. Paul Pioneer Press,* April 29, p. 19)

A4 "Anderson Arrived to Face Slay Charge"

By Donald J. Giese and Nate Bomberg

Sources close to police investigators report the 7 week old murder investigation . . . has netted "a mass of circumstantial evidence." This evidence is now being weighed to determine if it is sufficient to allow authorities to charge the man they believe planned, ordered and paid for the murder of Mrs. Thompson.

While Barkley refuses to comment on the identity of the man he considers the "prime suspect," he makes no effort to conceal the fact he believes the suspects now in custody acted on orders from the person police believe wanted Mrs. Thompson dead.

This man, police sources repeated Friday, could be arrested "at any time." Until he is, they said, the Thompson case is not completely solved.

Police informants indicated the suspect is and has been under close surveillance for weeks. Police make no effort to deny they are engaged with the suspect in a "war of nerves." Those close to the case believe a move, by the suspect, or the police is now imminent.
(*St. Paul Pioneer Press,* April 27, p. 17)

A5 "Slay Jury To Ponder Indictments Today"

By J. C. Wolfe

County Attorney, William Randall, later added that "I do not think the case will be closed with the return of the indictments." He declined to speculate as to when any further developments might occur, but his remark was in line with one recently made by Lt. George Barkley . . . who

said he was convinced that a fourth person remained to be arrested.
(*St. Paul Pioneer Press*, May 8, p. 1)

A6 "Eugene Thompson Arrested, Charged in Wife's Murder:
Implicated by Anderson Statement"
By Donald Giese

Police officials said early today the Thompson murder case was "now solved completely."

The statement was used in the request for change of venue. It leaves little double as to who police think was the "brains" behind the murder.
(*St. Paul Pioneer Press*, June 21, p. 1)

A7 "Warrant Issued In Murder Case"
By Donald Giese

Police Lt. George Barkley has never made a secret of the fact that his investigation of the case . . . led him to believe that the arrests of Mastrian and Anderson left him with a case only "two-thirds solved."

Barkley has maintained since the murder that a third man, he believes planned and paid for the killing of Mrs. Thompson must also be tried and convicted "before the Thompson case is completely solved."
(*St. Paul Pioneer Press*, June 21, p. 2)

A8 "Eugene Thompson Arrested, Charged In Wife's Murder"
By Donald J. Giese

He, Thompson, was arrested on a warrant issued late Thursday after Dick W. C. Anderson, Mrs. Thompson's alleged killer, gave police a lengthy statement.

The sensational break in the 3½ month-old murder came only minutes after Anderson earlier Thursday had declined

to give a statement on the advice of his attorney, public defender, Thomas E. Moore.

Police said Anderson suddenly changed his mind and sent word he wanted to give a complete statement.

Barkley began talking with Anderson in the office of the Ramsey County Sheriff shortly after 6 p.m. and was still closeted with Anderson early today.

Anderson gave Barkley an oral statement about the slaying and then at 9 p.m. consented to give police a formal statement. Police stenographer George Galles was taken by police squad car to the sheriff's office and shortly after 9 p.m. began taking a written statement from Anderson. (*St. Paul Pioneer Press,* June 21, p. 1)

A9 "Thompson Grand Jury Hearing Set Tuesday?"

By J. C. Wolfe

The murder charge was filed and a warrant issue against T. Eugene Thompson after Dick W. C. Anderson reportedly confessed he was the one who bludgeoned and stabbed Mrs. Thompson to death in her home . . . . last March 6.

Anderson's purported confession was given police officers in the Ramsey County sheriff's office after his talk with Randall. . . .

Under pressure of questions from a dozen newsmen, the prosecutor conceded that the fact Thompson was arrested following Anderson's statement was not just a coincidence.

"Would Thompson have been arrested if Anderson had not made any statement?" Randall was asked.

"I don't believe so," was the reply. He insisted that the filing of the Thompson charge "was the result of the accumulation of evidence that has come to me since March 6." (*St. Paul Pioneer Press,* June 22, p. 1)

A10 "Lawyers Seek Thompson Bail"

By Nate Bomberg and Donald Giese

Thomas E. Moore, the public defender assigned to represent Mrs. Thompson's confessed killer, Dick W. C. Anderson, said he is "still representing Anderson," even though Anderson confessed the murder Thursday against Moore's advise. . . .

Public defender Moore, who was not present when Anderson confessed to police late Thursday he killed Mrs. Thompson, said Sunday he will still represent Anderson. "I feel I should have been notified by the county attorney and the police and been present when Anderson gave them a statement." Moore said, "I feel it was their duty to notify me they were talking to my client."

(*St. Paul Pioneer Press*, June 24, p. 7)

A11 "Suspects May Be Linked With Other Slayings"

By Lew Patterson

The police chief, Lester McAuliffe, said that "apparently the confession of Dick W. C. Anderson makes it clear" that the murder of Mrs. Thompson "is a case of murder for profit". . . .

"Anderson admits the murder of Mrs. Thompson," McAuliffe said, "and implicates the other three." He said he meant T. Eugene Thompson, Norman Mastrian, and Sheldon Morris, all now held in the Ramsey County Jail.

McAuliffe said Detective Larry McMullen of the Hennepin County sheriff's office played a vital role in Anderson's confession.

"Last evening, Anderson sent word he wanted to talk to McMullen and the confession to Lt. George Barkley and others followed," McAuliffe said.

McAuliffe would not go into details of the Anderson confession. He said contents of the 20 page confession must wait for time of trial. Asked whether Anderson's confession

was signed, the chief said, "I don't know, but if it isn't, it will be. That is not a big point at this time."
(*St. Paul Dispatch*, June 21, p. 1)

A12 "I Would Have Come—Thompson Told Officers"
By Nate Bomberg and Don Giese

The warrant was issued following the confession Thursday night of Dick W. C. Anderson, 35 year old Minneapolis ex-salesman charged with the murder of Carol Thompson March 6, that he killed the attractive 34 year old mother of four in her home at 1720 Hillcrest Avenue.

Anderson's dramatic admission of the brutal beating-stabbing death came suddenly at 6 p.m. Thursday in the Ramsey County sheriff's office, where he gave a lengthy and detailed statement to Detective Lt. George Barkley, head of the homicide division.

Barkley said Anderson's statement gave police "far more information than we ever expected to get from him," and "broke the case wide open. . . ."
(*St. Paul Dispatch*, June 21, p. 10)

A13 "Anderson Story Implicating Thompson Related"
By Max Swartz

For the first time, the alleged role of T. Eugene Thompson, St. Paul Attorney, in the brutal slaying of his wife, Carol, was disclosed in part today. The dramatic account was related by Larry McMullen, a Hennepin County deputy sheriff, following a lengthy confession by Dick W. C. Anderson, who has admitted the actual slaying.
(*St. Paul Dispatch*, June 22, p. 1)

A14 "Mastrian Gets Sixth Delay"
By J. C. Wolfe

County Attorney William B. Randall . . . . said he does not plan at this moment to call for testimony from Dick

W. C. Anderson, the alleged "murder for pay" slayer of Mrs. Thompson.

Although Anderson's reported confession to the murder is said to have implicated the lawyer-husband in the plot, Randall said today he believes he has sufficient evidence to warrant Thompson's indictment without Anderson's testimony before the jury.

(*St. Paul Dispatch*, June 24, p. 14)

A15 "Thompson Bail Reduction Denied"

By J. C. Wolfe

Anderson since has given a statement to police purportedly admitting his role in the crime and implicating the others. He is said to have admitted that he received $2,300 from Mastrian shortly before he left Minneapolis in April. He subsequently was arrested in Phoenix.

Although Anderson's confession preceded Thompson's arrest by only a few hours last week, the alleged killer was not called as a witness at the grand jury hearing, nor would Randall concede he will be used as a state witness at the trial.

(*St. Paul Dispatch*, June 26, p. 3)

A16 "Thompson Reads During Bail Hunt"

It was Anderson's confession to St. Paul Police Friday that led to the arrest of Thompson who had been carrying on his normal activities since his wife was stabbed and beaten to death in their home March 6.

(*St. Paul Dispatch*, June 27, p. 1)

A17 "Clippings To Play Big Role"

By J. C. Wolfe

However, Randall has conceded that Thompson was nowhere near the scene when his wife was fatally attacked March 6 in the Thompson home at 1720 Hillcrest Avenue,

nor has he attempted to disguise the fact that he will try to prove that Thompson paid Mastrian to hire Anderson to commit the murder, something Anderson reportedly has confessed.

(*St. Paul Dispatch*, July 12, p. 2)

A18 "Thompson Loses Bid To Quash Indictment"

By J. C. Wolfe

He pointed out that Thompson's arrest came directly on the heels of a reported statement of admission by Dick W. C. Anderson, 34, Minneapolis, alleged to be the hired slayer of Mrs. Thompson.

(*St. Paul Pioneer Press*, August 13, p. 2)

A19 "No Decision Reached On Mastrian Objection"

By J. C. Wolfe

Remaining quiet in the county jail is Dick W. C. Anderson, 34, Minneapolis salesman, the man the state claims did the actual killing in the Thompson home at 1720 Hillcrest Avenue on March 6. He has pleaded innocent and is awaiting trial, although it is reported that he since has confessed and has implicated Mastrian and Thompson.

(*St. Paul Dispatch*, August 26, p. 15)

A20 "Thompson Fails To Contact Officials"

T. Eugene Thompson, whose wife was slain in her home, March 6, had contacted neither William Randall, Ramsey County attorney nor St. Paul police by noon today. . . .

Detective Lt. George Barkley, who said late Friday he is "surprised" that Thompson "has not cooperated more fully with us in a matter so serious as his wife's murder," told the Dispatch today: "I have done everything but get down on my knees to ask him to come in and see me."

Barkley positioned a detective at the public safety build-

ing in mid-morning on the chance Thompson would voluntarily contact police there.
(*St. Paul Dispatch*, March 23, p. 1)

A21 "Thompson Case Developments Nil"

T. Eugene Thompson . . . has been invited to contact police officials, but Detective Lt. George Barkley said today he had not heard from Thompson.
(*St. Paul Dispatch*, March 25, p. 15)

A22 "Tension Marks Thompson Probe"

By Edward Seidl

Both Barkley and William Randall have said they would like to talk with T. Eugene Thompson, husband of the murder victim. Thompson has not responded, however.
(*St. Paul Dispatch*, March 26, p. 1)

A23 "Thompson Named in Fee Protest"

By Jack MacKay

A $2500 fee paid by a Stillwater prison lifer to T. Eugene Thompson, St. Paul lawyer facing a murder charge, was the subject of a protest to the Minnesota Supreme Court in 1962, the Associated Press learned today. . . .

The convict wrote the Supreme Court March 26, 1962 complaining that Thompson received the $2500 fee from his brothers but did nothing to pursue a pardon or an appeal on Shannon's behalf.

"I must admit," Shannon wrote the Supreme Court, "that during the last year I have had a hard time communicating with Mr. Thompson. I have repeatedly asked him for information about the case, but all I got was a smile and a shrug of the shoulder. For some reason he refuses to tell me what he has done or intended to do or to show me the record. I can see no reason why the court

cannot compel Mr. Thompson to bring all the facts before the court to review. . . .
(*St. Paul Dispatch*, July 17, p. 35)

A24 "Police Not Ready to Reel In, 'Big Fish' in Carol Thompson Slaying Believed Near Net"

By Donald Giese

. . . . Norman Mastrian, the 39 year old Minneapolis police character authorities said is the middle man who set up the arrangements for the killing in the home of St. Paul Attorney T. Eugene Thompson at 1720 Hillcrest Avenue.

. . . . the killer, who police have identified as Dick W. C. Anderson, 35 Minneapolis.
(*St. Paul Pioneer Press*, April 25, p. 1)

A25 "Anderson Arraigned: $100,000 Bail Fixed"

Dick W. C. Anderson, accused hired slayer of Mrs. Carol Thompson . . . .

Police accuse Anderson of beating and stabbing Mrs. Thompson, a 34 year old mother of four, to death in her home at 1720 Hillcrest Avenue, March 6.

They charged that Mastrian, who they have described as a "middle man" hired Anderson to kill the woman. Sheldon Morris is charged with complicity in the plot.

Police acknowledge they have not yet arrested the "big fish" who hatched the slaying conspiracy.
(*St. Paul Dispatch*, April 27, p. 1)

A26 "Warrant Issued In Murder Case"

By Donald J. Giese

Police Lt. George Barkley has said, since their (Mastrian and Anderson) arrests, that the police case against Mastrian and Anderson "is airtight."
(*St. Paul Pioneer Press*, June 19, p. 24)

A27 "Thompson Grand Jury Hearing Set Tuesday"

By J. C. Wolfe

T. Eugene Thompson, St. Paul lawyer, accused in the murder of his wife, Carol, was in the Ramsey County jail Friday night awaiting a grand jury hearing Tuesday. . . .

Thompson, confined alone in a cell block, is held under $100,000 bail, the same amount set on the three men who were indicted earlier in what has been termed "murder for money."

He, Randall . . . . declined comment on what motive the state is prepared to ascribe for Thompson, saying that there is no requirement that a motive be shown.

However, the county attorney had stated previously that the state will attempt to prove that Norman Mastrian also indicted on a first degree murder count, hired Anderson to commit the crime. Mastrian formerly was a client of Thompson, who carried some million dollars in insurance on Mrs. Thompson.

(*St. Paul Pioneer Press*, June 22, pp. 1, 2)

A28 $100,000 Required, Thompson May Gain Bail Release Today"

By Donald Giese and Nate Bomberg

Thompson indicted by a Ramsey County grand jury Tuesday night for allegedly master-minding a plot to kill his wife, Carol, and collect more than a million dollars in insurance.

Murder suspect T. Eugene Thompson may be released. . . .

The 35 year old attorney has been housed in the Ramsey County jail since his arrest early Friday by St. Paul homicide detectives at his Forest Lake home on a warrant charging him with engineering the March 6 bludgeon-stabbing murder of his 34 year old wife and mother of his four children.

(*St. Paul Pioneer Press*, June 27, p. 1)

A29 "Thompson Bond Still Not Posted
Alleged Slayer Remains In Jail On Technicality"
By J. C. Wolfe

Day long efforts to obtain an acceptable bond for T. Eugene Thompson, alleged wife slayer . . . .

Thompson under indictment on a charge of first-degree murder, has been in custody since a week ago, Friday.

The accused man is alleged to have directed a plot that led to the slaying of his wife, Carol, 34, in their home at 1720 Hillcrest Avenue, last March 6.

Norman J. Mastrian, Spring Lake Park, named as the middle man in the alleged murder-for-pay scheme . . . .

(*St. Paul Pioneer Press*, June 29, p. 1)

A30 "Anderson Story Implicating Thompson Related"
By Max Swartz

For the first time, the alleged role of T. Eugene Thompson, St. Paul Attorney, in the brutal slaying of his wife Carol, was disclosed in part today. The dramatic account was related by Larry McMullen, a Hennepin County deputy sheriff, following a lengthy confession by Dick W. C. Anderson, who has admitted the actual slaying.

McMullen, who had arrested Anderson during an earlier bout with the law, was sent to Arizona to make the arrest and Anderson promised during their plan ride home that sometime, "I will give you Thompson and I can do it."

He, McMullen, quoted Anderson as saying the prearranged plan was for Thompson to call his wife at 8:25 a.m. and when the telephone rang, this would be the signal for Anderson to sneak up the basement stairs and attack Mrs. Thompson with a length of rubber hose. . . .

He, Anderson, said the telephone rang on schedule and he used a map of the residence given him by Thompson to follow his victim to her room.

(*St. Paul Dispatch*, June 22, p. 1)

A31 "Mastrian Gets Sixth Delay"

By J. C. Wolfe

County Attorney, William B. Randall . . . . said he does not plan at this moment to call for testimony from Dick W. C. Anderson, the alleged "murder for pay" slayer of Mrs. Thompson.

Although Anderson's reported confession to the murder is said to have implicated the lawyer-husband in the plot, Randall said today he believes he has sufficient evidence to warrant Thompson's indictment without Anderson's testimony before the jury.

Randall said John S. Connolly, St. Paul lawyer, who reluctantly appeared before the other grand jury, will be called back again. His testimony reputedly deals with the transfer of money from Thompson to Mastrian who has been named as the middle man in the murder scheme.
(*St. Paul Dispatch*, June 24, p. 19)

A32 "Thompson Bail Reduction Denied"

By J. C. Wolfe

Indicted in first-degree murder charged last month were Dick W. C. Anderson, 35, Minneapolis salesman, who is alleged to have committed the bludgeon-knife murder; and Norman Mastrian, 39, Spring Lake Park, a former client of Thompson, who is alleged to have hired Anderson for the job.

The state contends Thompson paid Mastrian to arrange the killing and among evidence reportedly placed before the Grand Jury was that concerning transfer of $2500 in cash from the lawyer to Mastrian.

John S. Connolly, also a lawyer, has said he acted as the messenger in that transaction and that the money was supposed to represent the refund of a legal fee Mastrian had paid Thompson after the former had been arrested for questioning in the still unsolved Eddy James murder. . . .

While the indictment charged the 35 year old lawyer with the premeditated murder of his wife, Carol, in their home at 1720 Hillcrest Avenue, on March 6, Randall said that it was a known fact Thompson was not present at the time of the killing.

Randall said Thompson is being charged as a principal to the crime, the state contending that he paid to have the murder committed. The prosecutor indicated the state would try to establish $1,061,000 in insurance on Mrs. Thompson as a prime motive. Her husband was both owner and beneficiary of the policies which were short-term ones and which paid only in the event of accidental death.
(*St. Paul Dispatch*, June 26, p. 3)

A33 "Thompson Bail Stalled"

By J. C. Wolfe

Thompson is accused of master-minding the murder-for-pay scheme that resulted in the brutal, fatal beating and stabbing of his wife, Carol, in the Thompson home at 1720 Hillcrest Avenue, March 6.

His arraignment on a first-degree murder indictment has been put over to July 8 to permit his attorneys, William Fallon and Hyam Segell, to prepare motions for the Court.

Under similar indictments are Dick W. C. Anderson, 34, one time salesman, who is alleged to have staged the bludgeon-knife murder, and Norman Mastrian, 39, Spring Lake Park, former client of Thompson's accused of being the middle man who hired Anderson for the job.
(*St. Paul Dispatch*, June 28, p. 2)

A34 "Thompson Faces Arraignment On Murder Charge"

By Donald Giese

T. Eugene Thompson, accused of plotting the death of his wife is scheduled to appear in district court here at

9:30 a.m. today for arraignment on a charge of first degree murder.

The 35 year old lawyer, who police say masterminded and paid for the March 6 beating-stabbing death of his 34 year old wife, Carol, in the family home at 1720 Hillcrest Avenue . . . .

Norman Mastrian, 39, who police claim was the middleman in the alleged murder-for-hire and Dick W. C. Anderson, the confessed killer of Mrs. Thompson, remain in Ramsey County Jail in lieu of $100,000 bond each. Anderson has admitted he killed Mrs. Thompson; Mastrian has yet to be arraigned on the murder charge against him.
(*St. Paul Pioneer Press,* July 8, p. 13)

A35 "Thompson Quash Bid Due Monday"

By J. C. Wolfe

. . . . Technically, Thompson, accused of engineering the alleged murder of his wife, Carol . . . . Also due for arraignment Monday is Norman Mastrian, 39, ex-boxer from Spring Lake Park who is under similar indictment and who is alleged to be the middleman in the murder plot.

The state has said it will attempt to prove that Thompson paid Mastrian to hire a third man to stage the murder of the 34 year old mother of four in her home at 1720 Hillcrest Avenue last March 6.
(*St. Paul Pioneer Press,* July 21, Sec. 2, p. 1)

A36 "Mastrian Gets Delay to July 22"

By J. C. Wolfe

Norman J. Mastrian, one of three men charged with the murder of Carol Thompson, asserted in district court today that "police harassment" is one of the reasons why he has been unable to raise money for an attorney. . . .

Mastrian's last reference was to John S. Connolly, St. Paul lawyer, who is reported to have told about delivering

$2500 in cash from T. Eugene Thompson, the slain woman's husband who also is charged with murder, to Mastrian. The money was said to have represented the refund of a legal fee Mastrian had paid Thompson to represent him when he was questioned in the Eddy James murder case.

The state has charged that Thompson, beneficiary to $1,061,000 in accidental death insurance on his wife, concocted the plot for her murder and paid Mastrian who in turn hired Dick W. C. Anderson to do the actual killing.
(*St. Paul Dispatch*, July 1, p. 1)

A37 "Thompson Yet To See Randall"

T. Eugene Thompson, husband of the slain Carol Thompson, has not contacted law-enforcement officials yet, according to William Randall, Ramsey County official.

Randall said late Wednesday night that the expected contact between Thompson and himself did not take place Wednesday.

"I'll be in my office at 9 a.m. today," Randall said. "I hope we hear from him soon."

Thompson had issued a statement Tuesday saying he wished to meet officials to discuss insurance matters and other details in his personal life.
(*St. Paul Pioneer Press*, March 28, p. 19)

A38 "Mastrian Gets Sixth Delay"

By J. C. Wolfe

Randall said John S. Connolly, St. Paul lawyer, who reluctantly appeared before the other grand jury, will be called back again. His testimony reputedly deals with a transfer of money from Thompson to Mastrian, who has been named as the middleman in the murder scheme.
(*St. Paul Dispatch*, June 24, p. 19)

A39 "Randall Would Talk On Slaying"

County Attorney William Randall said today he would like to confer with T. Eugene Thompson, whose wife Carol, was fatally stabbed and beaten in the Thompson home March 6.

Randall said he is interested for one thing, in talking with Thompson about insurance policies on Mrs. Thompson.

Randall said he has seen policies totaling more than a million dollars on the dead woman. Each of the policies is payable only in the case of accidental death, Randall said, and each was taken out within the last year. He said all policies are due to expire in April.

Thompson was the applicant, beneficiary and owner of all the policies, Randall said.

Randall also said he would like to talk to Thompson about clients he represented in recent years. . . .
(*St. Paul Dispatch*, March 22, p. 1)

A40 "Seek Data On Slain Wife, Thompson Fails To Contact Officials"

Randall said he is interested among other angles in discussing with Thompson insurance policies held on his wife. Randall said he has seen application for policies totaling more than a million dollars on Mrs. Thompson, all naming Thompson as applicant, owner and beneficiary.

Randall, who said Friday he had seen the policies, today said instead he has seen applications for the policies, not the policies themselves.
(*St. Paul Dispatch*, March 23, p. 1)

A41 "Insurance Policy Claims Of Thompson Still Unpaid"

None of the claims against five insurance companies for a total of $1,061,000 by T. Eugene Thompson, for the death of his wife has been paid. . . .

The insurance companies can either accept or reject the

claims, according to one insurance lawyer. One company Lloyds of London, reportedly has refused to pay the $250,000 policy it issued on the life of Mrs. Thompson. . . .

One insurance company spokesman said . . . . his firm still is investigating the "unusual circumstances" surrounding the death of Mrs. Thompson.

(*St. Paul Pioneer Press*, May 23, p. 15)

A42 "Thompson Indicted By Jury"

By J. C. Wolfe

It was also made plain that the motive the state will attempt to establish against Thompson will be the accidental death insurance of $1,061,000 which was carried in various policies on Mrs. Thompson and of which her husband was the owner and beneficiary. . . . Another witness . . . . was James Treanor, St. Paul insurance agent who said he sold about two-thirds of the casualty insurance that was carried on Mrs. Thompson, all of it being of the short term variety.

It was the first time any testimony regarding the insurance had been brought into the case save what Thompson himself might have offered when he appeared voluntarily before the grand jury last month.

(*St. Paul Pioneer Press*, June 26, p. 1)

Appendix E

[SATURDAY EVENING POST — September 14, 1963]

WHY WAS CAROL KILLED?

At first it looked like the act of a maniac. But then came rumors of a fortune involved. And one man told a chilling story soon to unfold in court.

By DONALD JOHN GIESE

The last morning of Carol Thompson's life dawned cloudy and cold. A light snow during the night had blanketed St. Paul, Minn., and the thermometer stood at 30 degrees. She would much rather have stayed in bed, but she had to get breakfast ready, bundle her four children off to school and see her husband off to his law office. The morning of last March 6, in fact, started out just like any other late-winter weekday.

With breakfast finished, the dishes stacked neatly in the sink, her husband in his office, and the children at school, the attractive 34-year-old housewife did what a great many housewives do after the family's departure each morning —she went back to bed.

Her rest was interrupted just before nine A.M. by the ring of the telephone in the kitchen. She slipped on a housecoat and went downstairs. It was her husband calling from his office with a reminder of some family errand she was supposed to do. She said good-bye, hung up the phone and went back upstairs. She got into bed, turned on the radio beside her and started to doze.

As she did so—according to the police reconstruction of the murder—a figure stepped out of the shadows in the basement. It moved quietly up the basement stairs, paused at the first-floor landing, then started up the stairway to

the master bedroom in the attractive two-story brick house at 1720 Hillcrest Avenue in the city's upper-class Highland Park district. If Carol Thompson heard any sound at all before a hand slowly turned the knob of her bedroom door, she probably wished frantically for two things—the bedroom plug-in telephone that had recently been removed for later replacement with a new Princess phone, and the family's two-year-old dachshund, Schatzie, which had been recently given away. But as the knob turned and the door opened, she was alone and helpless.

The figure of a man rushed across the room. She leaped from bed. The man struck her with a length of rubber hose. The blow knocked her unconscious. The man picked her up and carried her toward the bathroom. Reviving, she broke away and hurtled down the stairs. She ran for the front door. She could hear him coming close behind her. She turned the lock on the door and pulled. It wouldn't open. Just as she saw that it was held by a chain lock, the intruder caught up with her.

A rain of blows from the butt of a heavy Luger pistol knocked her down, and as she lay on the carpet the pistol butt struck her again and again. Going to the kitchen, the man got a paring knife and plunged it into her throat until the blade broke off. Then he went upstairs to the bathroom and tried to wash off the blood that covered him.

When he returned downstairs a few minutes later, his victim was gone. He rushed to a window and saw her stumbling along the closed door of a garage in the adjoining yard. He fled in panic.

It was just a little after nine A.M. when the doorbell rang at the home of Harry C. Nelson at 1700 Hillcrest. The Nelsons found Carol Thompson, barefoot, clad only in her housecoat, and almost unrecognizable because she was so covered with blood. They helped her lie down, covered her with a blanket and called the police. Dr. Fritz

Pearson, a neighbor, also called immediately, came to examine Carol and asked her what had happened. She did not answer.

A police ambulance rushed her to Ancker Hospital. Surgeons worked desperately to save her, but it was far too late. Carol Thompson died shortly before noon of skull fractures and a massive brain hemorrhage. Doctors counted 50 severe wounds on her head and face, plus the knife wounds in her neck. "It was the most brutal beating I've ever seen, and I've seen a lot of them," said one doctor in the city hospital.

While Carol's husband, 35-year-old T. (for Tilmer) Eugene Thompson, waited outside the emergency room, Detective Lt. George Barkley started going through the Thompson home in search of clues. Near the front door he found pools of blood, the handle of a paring knife that had been plunged into the victim's throat (surgeons removed its four-inch blade from her neck), a piece of a plastic pistol grip, and a clip and several cartridges that had evidently fallen from the gun when the grip broke. Upstairs in the bathroom were blood smears—and, unaccountably, a bathtub half full of clear water. More blood smears showed on the garage next door, where Carol Thompson had stumbled in her flight.

As head of the homicide division, Barkley, a slight, dour, balding man of 56, was put in charge of the case. Police Chief Lester E. McAuliffe gave him carte blanche. "Handle it with whatever it takes," McAuliffe ordered.

While police combed the Thompson house and renovators came in to paint and repair, Thompson's relatives took in the widower and his four stunned children—Geoffrey, 14; Patricia, 12; Margaret, 9; and Amy, 6. On Friday, two days after the murder, Thompson met with Barkley at headquarters. The short, blond, boyish-faced attorney said he could offer no help. He had no idea who might have

killed is wife, or why, he told Barkley. He said he had called her on the telephone after arriving at his office and she had been all right. Several times during the meeting, Thompson fought to hold back tears. "He was badly shaken," Barkley said.

Detectives continued their routine investigation into the background of the victim. They found no leads. Carol Thompson, the only child of a wealthy plumbing contractor named Otto Swoboda, emerged on the police reports again and again as a "sweet, wonderful person," "a devoted mother and wife," "a lovely woman."

"From what we learned, Carol Thompson apparently didn't have a known enemy in the world," Barkley said. "We checked everywhere and couldn't come up with a thing that might have indicated she was anything but a very popular woman and a devoted mother and wife."

From the reports that began coming into his office only hours after the murder, Barkley ruled out the possibility that Carol Thompson was killed by a burglar or had been the victim of a sex maniac.

Like most veteran police investigators, Barkley plays hunches. His hunch was that the friendly and attractive housewife had been the victim of a premeditated cold-blooded murder. But why? And why such a sloppy, nearly botched job?

An intensive investigation into the relationship between the victim and her husband showed only that they enjoyed doing things together, taking trips, discussing family plans, playing with their children. Carol had recently accompanied her husband to two bar-association conventions. Close friends of the couple said that they had the usual spats ("What do you mean, $30 for a pair of shoes?"), but that they had never been known to have a really serious quarrel.

Thompson was an elder and a trustee of the Presbyterian

church where both he and his wife often sang together in the choir. They never missed Sunday services. The Thompsons and their four children were familiar figures to all the congregation and the minister.

They had met while both were students at St. Paul's Macalester College. They were married in their sophomore year and Carol dropped out. Thompson, the fifth of seven children and raised on a farm near Elmore, Minn., was graduated from Macalester in 1950. He got a job with an insurance company, and then went on to get his law degree in 1955 from the St. Paul College of Law, a night school, graduating second in his class. His colleagues and the judges before whom he practiced considered him a bright, aggressive young lawyer who was doing extremely well.

The family's finances could hardly have been better. Through proceeds from a large trust fund set up for Carol by her father, and earnings from Thompson's growing practice, the couple jointly reported income of $44,693 in 1962. Thompson's personal net worth at the time of his wife's death was $115,000.

Following the murder, Thompson threw himself into his law practice, which included work as village attorney for suburban North St. Paul as well as the routine criminal and civil work of a busy and promising young attorney. Friends and associates noticed he was losing weight. They felt he was working too hard and grieving too much.

After a time he and the children moved back into their home, and one of Thompson's three sisters, Mrs. Geraldine Gesche, wife of an Elmore farmer, came to keep house and care for the children. "It's not a very comfortable feeling living here after the terrible thing that happened to poor Carol," Mrs. Gesche told me at the time. "We keep the doors locked because we keep thinking that whoever did it might come back."

The investigation of Carol Thompson's murder continued. Barkley shut himself in his office on the third floor of St. Paul's Public Safety Building, and the stack of reports on his crowded desk grew higher and higher, soon numbering in the thousands. Reporters waiting outside his office noticed a number of strangers coming and going. Barkley explained that they were insurance-company investigators "on routine business." Rumors spread that the life of Carol Thompson had been heavily insured—possibly for more than one million dollars.

Newsmen by the dozens called at Thompson's office and his home. At his office a receptionist told them Thompson was "in conference," and at his home his sister, Mrs. Gesche, told them he was either "resting" or "not at home." Since the murder, Thompson had declined to talk with any members of the press. Hundreds of messages from reporters were left at his home and his office, asking that he return the calls. None received a personal reply.

Because of his silence, and the intense public interest in the murder, there were more and more rumors. Finally, on March 26, T. Eugene Thompson released, through a friend and family confidant, a statement to "correct the fanciful, far-fetched stories that some people have been alluding to."

In his prepared statement Thompson disclosed that the total insurance in force on his wife at the time of her death amounted to $1,061,000. Six policies totaling $950,000, were taken out in April, 1962, the statement said. Annual premiums on her insurance amounted to $1,908.15. Thompson was listed as beneficiary or owner on all of the policies. Mrs. Thompson was required to take medical examinations before some of the policies were issued. Thompson's own life was also heavily insured—for $460,000. "We thought this was good protection for ourselves and our children," Thompson stated. The statement added that Carol Thomp-

son was "heir to a substantial amount of money" (believed to be in the neighborhood of a million dollars, the estimated wealth of her parents).

MISSING WATCHDOG

The statement went on to correct "stories circulating relative to a large watchdog which was supposedly owned but supposedly got rid of shortly before Carol's death." Thompson's statement explained that the small dachshund family pet was given away in the latter part of January because new carpeting had been installed and it was feared the dog would soil and ruin it, as he had the old carpeting.

Instead of dispelling the rumors, however, Thompson's public statement only added fuel to them. For example, reports circulated that, at the time of his wife's death, Thompson had had a girl friend, and that police had taken a long statement from her. The Thompson murder became the most discussed topic in the Twin Cities. Hundreds of armchair detectives called the editorial offices of the local newspapers to offer their theories. Calls and letters also flooded the offices of Police Chief McAuliffe and Mayor George Vavoulis, insisting that either the Thompson case should be solved or the responsible police officials should be fired. Mayor Vavoulis reaffirmed his faith in Chief McAuliffe, and McAuliffe reaffirmed his faith in Lt. Barkley. And Barkley continued to sit in his office like a thin, inscrutable sphinx. "It's going to be a long, hot summer," he said, "but I intend to keep comfortable and cool."

Barkley confided to this writer that he had "a feeling —something I can't define—that everything is going to be all right." He said he didn't know when or how it would come, but he expected a "break." "Until we get one, or make one, I'm going to keep working like hell and let time take its toll," he said. "Time is one thing we've got plenty of."

While Barkley played the waiting game, the victim's mother, Mrs. Otto Swoboda, told this writer that her son-in-law—whom she and others close to Thompson affectionately called by his childhood nickname of "Cotton"—"woke up screaming from bad dreams about violent death" several weeks before his wife was murdered. "He seemed to be haunted about something happening to Carol, and shortly before her death she told me she had to wake him from a terrible nightmare," Mrs. Swoboda said.

"Carol said he was going through some kind of torture in his sleep, and when he screamed she woke him and he then told her he had dreamed something terrible had happened. Shortly before our daughter was killed he told me he didn't know what he would do if anything ever happened to her. Then after the murder he was stunned over the freakish, terrible thing that suddenly happened.

"We knew he had Carol's life heavily insured. He told us he felt the mother was more important than the father."

Friends reported that Thompson had told them he was at times "clairvoyant" and possessed acute "perceptive powers" that occasionally allowed him to have premonitions of future events. Intrigued, the press stepped up its efforts to talk with Thompson, but he remained unavailable to reporters.

When asked why Thompson refused to talk with the press, Mrs. Swoboda explained that he had told her and her husband that he had been instructed by his attorneys to "make no statements." His sister, Mrs. Gesche, said he would talk to reporters "when he is ready."

She said Thompson had told her that his interpretation of the law was "that a person need say nothing and must be presumed innocent until proved guilty." Reporters explained to Mrs. Gesche that they did not want to discuss questions of guilt or innocence, but merely wanted to talk with Thompson, who, after all, was the murdered woman's

husband. "Well, that is the way he explained it to me," she said. "I am sure you recognize Mr. Thompson's position in the community here, and I assure you he will talk to you when he is ready."

Then in early April, Barkley got the break he had been waiting for. Some days earlier a Minneapolis salesman had told police that the gun used in the murder was his; he recognized its distinctive white-and-black plastic grip from newspaper pictures of the piece found in the Thompson home. The gun had been taken from his apartment three weeks before the murder, he said.

Now, two Minneapolis gunmen arrested for the attempted holdup of a Twin Cities bar confessed that they had stolen the salesman's gun in one of a series of earlier burglaries. Afraid of a possible murder rap, the two gave police information which enabled them to trace the gun's movements through the hands of small-time Minneapolis hoodlums to a man who might have had it at the time of the murder.

On the night of April 18, law officers held a strategy session in the office of William B. Randall, tall, Lincolnesque County Attorney of Ramsey (St. Paul) County. They decided to move quickly on the information they had.

At four A.M. April 19, St. Paul homicide detectives kicked down the door of a suburban Minneapolis home and arrested a curly-haired, 39-year-old college graduate and ex-boxer named Norman Mastrian. Police claimed he was the middleman in the Thompson murder.

At five P.M. the same day, outside a motel in Phoenix, Ariz., police arrested a 35-year-old Minneapolis roofing salesman named Dick W. C. Anderson. St. Paul police alleged that Mastrian had hired Anderson on a "contract" for $3,000 to kill Carol Thompson the morning of March 6. Reportedly "shaking from head to foot," Anderson refused to discuss anything about the Thompson case, but

he voluntarily agreed to be returned from Phoenix to St. Paul.

Confronted by Barkley, Mastrian also remained silent. The two men were not strangers, but neither were they friends.

Mastrian had been arrested and questioned in connection with the murder of a St. Paul restaurant operator in 1961. During the interrogation, Mastrian had kept total silence, and his release had finally been obtained by his long-time legal counsel and fellow student at Macalester College, T. Eugene Thompson.

Thompson released the following statement on the day of the arrests: "I am very pleased with the news this morning from St. Paul police and the County Attorney's office that important new developments have taken place concerning the solution of my wife's murder. I pray that the guilty parties will be quickly brought to justice. I telephoned the County Attorney this morning and. . . . assured him of my fullest cooperation.

On May first, in a slough on a farm near Elk River, north of St. Paul, police found the Luger pistol used in the murder. On May 10, torn, stained trousers, bearing the name "Anderson" on an inside pocket, were also found near Elk River. In jail, Anderson received word that the net around him was drawing tighter.

Meanwhile, on May 8, a Ramsey County grand jury had indicted Mastrian and Anderson on charges of first-degree murder. They were held in lieu of $100,000 bond each, one of the largest bonds ever set in a criminal case in Minnesota.

Nevertheless, Lt. Barkley claimed the case was only partly solved. Mastrian and Anderson, he explained, had no personal motives for wanting Mrs. Thompson killed. Therefore, Barkley reasoned, someone must have arranged for the two men to commit the murder. The victim's father,

Otto Swoboda, agreed with Barkley. "I cannot imagine how these men by themselves can explain the tragedy that happened," he said.

Anderson's lawyer, a Phoenix attorney named Marvin Johnson, implied that his client could "wrap up the Thompson case," but he wanted something in exchange—a reduction in the charge of first-degree murder. Lieutenant Barkley said he would be interested in hearing Anderson's story, but he refused to consider any "deals." After several attempts to set up a meeting had failed, Johnson withdrew from the case and Ramsey County Public Defender Thomas E. Moore was appointed to defend the near-indigent Anderson.

Another round of exchanges began between Lt. Barkley and the Public Defender, but with no greater success. Then in the early evening of June 20, as Barkley was sitting in Chief McAuliffe's office, the phone rang. A deputy at the Ramsey County jail told Barkley that Anderson wanted to see him. Barkley called County Attorney Randall, and both men hurried to the jail. There Anderson told them he wanted to make a full confession—without Public Defender Moore's knowledge and against his advice.

As he unfolded the gory details of the murder, Anderson was sweating profusely and seemed extremely nervous. "But at the same time he appeared relieved," Barkley said.

While Anderson's statement has not been released, the substance of it is known, through reliable sources who were present at the time. Here, then, is what Anderson told Barkley and other law-enforcement officers that night.

Anderson said he was hired by Mastrian to kill Carol Thompson and to make the murder appear an accidental death. According to a carefully laid plan, he entered the Thompson home shortly after five A.M., long before dawn, on the day of the murder. He lay in wait in the basement until other members of the family had left the house. He

said he had been briefed on the layout of the house and knew that a family pet, reportedly very attached to Carol Thompson, had been disposed of and that a telephone extension in an upstairs bedroom had been removed. The only phone, he had been told, would be in the kitchen, near the basement stairs.

Anderson said that the plan called for him to remain in the basement until the phone rang. Its ring would bring Carol downstairs from her bedroom and place her with her back to the basement door. The ring would also be the signal for him to sneak up the basement stairs and attack Carol with a length of rubber hose.

Anderson said the mark that would be left when he struck her across the base of the skull was intended to simulate injuries she might have received if she had fallen down in the tub while bathing. He was then supposed to disrobe the victim and carry her to the bathtub. There, using reverse artificial respiration, he was to press air from her lungs while he held her head under water. That would allow the water to enter the lungs in order to make the death appear an accidental drowning.

But as he waited for the phone to ring, Anderson said, he tested several steps on the basement stairs. They squeaked. He was afraid that his victim might hear him if he followed instructions. He decided, instead, to wait until she had returned to her bedroom after the call, and then to attack her there.

The telephone rang on schedule, Anderson said, and he waited until Carol Thompson had returned to bed. Then he went up to the bedroom. She was lounging in bed, listening to the radio. When she saw Anderson she leaped from bed. He struck her and knocked her down, then picked her up and started carrying her to the bathroom for the simulated drowning. But she suddenly revived, broke away

from him and fled down the stairs to the front door, screaming, "Help me! Oh, God, help me!"

Anderson said his victim might have escaped out the front door if it had not been bolted and double-locked with a night chain. The chain delayed her just long enough for Anderson to reach her. He then struck her on the head repeatedly with the Luger, which broke under the impact of the blows. At that, he ran to the kitchen, got a paring knife and stabbed her in the neck until the blade broke off.

Sleep After Singing

After Anderson had signed his statement, he turned to the several officers who were present and said, "Maybe I'll be able to sleep tonight."

Even as Barkley was hearing the last of Anderson's confession, a first-degree murder warrant was being obtained from Municipal Judge J. Clifford Janes. That warrant, issued at 9:30 P.M., charged Tilmer Eugene Thompson with "effecting" the premeditated murder of his wife.

At 1:30 A.M., June 21, the small, thin, pale attorney was arrested at the Thompson summer home on Forest Lake, 25 miles north of St. Paul. He was taken to the third floor of the Public Safety building in St. Paul, booked on the murder charge and fingerprinted. Identification Officer Arnold Melby recalls that Thompson was "the most relaxed" suspect he'd ever processed.

Led to Barkley's office, Thompson told the homicide chief that it hadn't been necessary to send men to arrest him, that he would have come in if Barkley had called. And he added, "George, you know I didn't have anything to do with it (his wife's murder)."

"I don't know anything of the kind," Barkley replied stonily.

Thompson then spent over an hour with his attorneys, after which he was taken to the jail. "He was asleep ten minutes after he entered his cell," a jailer said. The next day he appeared in court and had his bond set at $100,000.

On June 25 Thompson was formally indicted by a Ramsey County grand jury for the murder of his wife. Dick Anderson, whose confession apparently triggered the dramatic arrest of Thompson, was not called to testify. "We didn't need his testimony," Barkley said.

On June 29 Thompson's family arranged financing for the $100,000 bond, and Thompson was released after spending eight days in jail. As he walked out, one of the waiting reporters asked him: "What are you going to tell your kids?" Thompson paused, searched the crowd for the face of the questioner and then replied in an even voice, "I'm going to tell them the truth."

Since then Thompson has been living with his children and a housekeeper at their home in Forest Lake. He has given up his law practice, but he comes to St. Paul nearly every day for conferences with his attorneys and to take care of family business. According to friends, he is gaining back some of the 25 pounds he lost after his wife's murder. He water-skis on the lake and plays with his children, often serving as a moderator in their spirited spelling bees.

On August 19 Thompson formally pleaded not guilty, and the date of his trial was set for September 23. The few people close to him say he is "concerned" about the charges against him, but is facing his trial "calmly and realistically."

Its case apparently built entirely on circumstantial evidence, the state will claim that Thompson hired Mastrian to hire Anderson to kill Thompson's wife on the morning of March 6. The state is expected to claim that Thompson's motive for wanting his wife dead was the million

dollars in insurance on her life—which has not been paid, although Thompson filed claim against the insurance companies in May. In his defense Thompson is expected to claim he had nothing to do with the murder of his wife, and that the charge against him is the result of a bizarre string of circumstances and the untrue statements of men who are attempting to implicate him in desperate efforts to save themselves.

St. Paul, called a "citadel of crime" during the 1930's, has had its share of sensational murders but never one that aroused the interest of the entire city as has the killing last March of pretty Carol Thompson. Yet, ironically, if that murder had followed the script police claim was meticulously planned for over a year, St. Paul might not have had another murder at all—only the unfortunate drowning of a young housewife in a bathtub. THE END.

Appendix F

[NEWSWEEK — July 1, 1963]

CRIME:

MILLION-DOLLAR MURDER?

In the comfortable red-brick house in Highland Park, the exclusive residential section of St. Paul, Minn., bouncy, bespectacled Mrs. Carol Thompson, 34, was enjoying the housewife's quiet hour. It was last March 6, a morning of sub-zero cold, and her husband, Tilmer Eugene Thompson, had left for the office to attend to his $40,000-a-year criminal-law practice. The children—Geoffrey, 13, Patricia, 12, Margaret, 9, and Amy, 6—were off to school. Carol Thompson was in her upstairs bedroom, still in her bathrobe when the killer found her.

Mrs. Thompson died hard. The killer first aimed a Luger pistol at her and, when it misfired, clubbed her so hard and repeatedly with the pistol butt that one of the plastic grips fell off. He dragged her, struggling wildly, into the bathroom and tried to drown her in the tub. She escaped to the living room and was finally battered unconscious. The murderer then got a knife from the kitchen and broke off the 4-inch blade in her throat before he fled.

But Carol Thompson got to her feet and stumbled through the cold to a neighbor's house. Nobody home. Groping on to another house, she knocked weakly and gasped, "... a man ..." She never spoke again.

To the St. Paul police, though, the broken piece of pistol seemed to speak eloquently. Through it, they were sure, the killer could be found. Then, perhaps, this apparently random act of violence might be explained. Nothing was stolen. Hardly anybody could have profited from Mrs. Thompson's death—except, of course, Thompson himself. He was beneficiary on insurance policies worth $1,061,000 and his wife was heiress to the $600,000 fortune of her

father, Otto Swoboda, president of a plumbing and contracting firm.

The police shrugged off their suspicions. They concentrated on the pistol grip, which a reader recognized from a newspaper photograph as part of a Luger taken in a burglary of his home. The burglars soon fell into the police net; they had passed the weapon on to Norman Mastrian, 39, a former boxer who once attended Macalester College in St. Paul.

FISH NET: Now the suspicion surged anew. Thompson had also attended Macalester on the GI Bill and, in fact, met his wife there. Even as the police rounded up Dick W. C. Anderson, a hard-drinking former roofing salesman of 35, and Sheldon Morris, 34-year-old former cabdriver across the Mississippi in Minneapolis, they grew ever more convinced that "the big fish" was Thompson.

It was Anderson who was charged with the actual murder. He was traced to Phoenix, Ariz., and detective Larry McMullen was sent to bring him back.

On the plane ride back to St. Paul, McMullen and Anderson learned that they had both been Marines; Anderson had even been decorated during the Korean War. They grew friendly and suddenly Anderson turned to McMullen and said: "Larry, regardless of what happens to me, whether I make the street free and clear or whether I'm in for the rest of my life, I will give you T. Eugene Thompson. And I can do it."

That was in April. Almost weekly since then, detective McMullen has gone to the Ramsey County Jail in St. Paul and talked with Anderson. "He always greeted me with a great big smile and a handshake," McMullen said. Not until last week, however, did this strange "Crime and Punishment" dialogue pay off. Then Anderson told his story—how cabdriver Morris helped dispose of the Luger in a swamp north of St. Paul, how Mastrian came to him

as a go-between for Thompson and gave him $3,000 for the killing.

Thompson was arrested in the snug log-cabin summer home that he shares with his wife's parents on Forest Lake, 25 miles north of St. Paul. Silent, a small neat figure in blue suit and crew cut, Thompson stood before a magistrate where he had often pleaded for his criminal clients and heard himself charged with purchasing the brutal death of his wife.

Appendix G

[St. Paul Pioneer Press — Thurs., April 14, '66]

COURTS HELD FAVORING CRIMINALS

Too many of society's criminals are getting away with murder—both figuratively and literally—and the courts are partly to blame, GOP gubernatorial candidate William B. Randall charged Wednesday.

Randall, Ramsey county attorney whose successful prosecution of the T. Eugene Thompson murder case three years ago brought him national attention, said in a speech at the University of Minnesota Legal Aid clinic's dinner in Minneapolis that criminals have never had it so good.

He also said in his speech, Crime in the Streets and Crime in the Courts, that prosecutors and police have never had it so bad.

"It is time that the rights of society should be given more consideration if our civilization is to overcome the criminal elements within it," he said.

Riots in Watts Cited

He termed the recent Watts riots in Los Angeles' Negro ghetto "probably the century's most spectacular crime on the streets." It was "an unparalleled extravaganza involving 34 deaths, the burning of 175 million dollars worth of property and the stealing of untold more millions in merchandise," he said.

"And, of course, we cannot forget the crime of the so-called ordinary sort—if we can accept any crime as being ordinary—is steadily on the rise," he said.

He questioned whether or not a trial is really "a search for truth," and said recent supreme court rulings have served to prevent a jury from learning the truth.

Randall said a suspect is often the only one who knows about a crime but he can remain mute, the presiding judge

cannot comment on his silence, and the prosecutor can't mention the suspect's failure to testify in his own behalf.

ST. PAUL EXAMPLE

"A prosecuting attorney lives under the constant threat that evidence which was legally seized and legally used at a trial will become illegal by the time that conviction in that particular case is appealed to the state supreme court," he said.

He cited a recent St. Paul burglary in which police arrested suspects they claim entered a local firm, smashed a safe, made off with jewelry and fired a shot from a pistol as they fled.

Police found the gun and the jewelry in the home of one of the suspects, along with other incriminating evidence, Randall said. But he said if he introduces the evidence and gets a conviction, the U. S. supreme court might reverse it by ruling "admission of either the gun or the jewelry, or both, was unconstitutional."

Randall said that a jury might think he was a "silly fool" for asking them to find the suspects guilty without hearing such testimony and viewing vital evidence obtained by arresting officers, but which might be frowned upon by the U. S. supreme court.

"The criminal process as we know it today is a contest between society and the accused in which the latter has many means of preventing the truth about his possible crime from being made known to the jury," he said.

SOCIETY'S RIGHTS

"Today's criminal trial is a fiercely contested affair and, more importantly, the weapons available to the accused rapidly threaten to outweigh those available to the prosecution."

Randall said "the power of the police to prosecute should be no less strong than the power of the criminal to rape, rob and riot."

"The courts should be as concerned with the rights of society as the rights of the criminal," he said.

"What is the good of concern for the individual if the entire society is drowned in a flood of crime?" he asked.

"If we sacrifice the prosecution of crime to the rights of the individual, what is to prevent the fabric of society from being torn asunder when the deterrence to crime is thus reduced?"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. [redacted] 144

T. EUGENE THOMPSON,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1324

T. EUGENE THOMPSON,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

Citation to Opinions of the Court Below

The opinion of the Supreme Court of Minnesota is reported at 139 N.W. 2d 490. An earlier opinion of the Supreme Court of Minnesota in the same case is reported at 266 Minn. 395, 123 N.W. 2d 378.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

United States Constitutional Provisions

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minnesota Constitutional Provisions

Article I, §6

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

Minnesota Statutes, 1961

"627.01 Place of trial; change of venue

Every criminal cause shall be tried in the county where the offense was committed, except as otherwise provided by law, unless it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the same shall be pending, if the offense charged in the indictment is punishable with death or imprisonment in the state prison, may direct the person accused to be tried in some other county, in the same or any other judicial district in the state, where a fair and impartial trial can be had; but the party accused shall be entitled to one change of venue only."

"631.02 Continuance; defendant committed, when

When an indictment shall be called for trial, or at any time previous thereto, upon sufficient cause shown by either party, the court may direct the trial to be postponed to another day in the same term, or to another term, and all affidavits read upon the application shall be filed with the clerk at the

same time. When a defendant who has given bail shall appear for trial, the court may, in its discretion, at any time after such appearance, order him committed to the custody of the proper officer of the county, to abide the judgment or further order of the court."

Rules of the United States Supreme Court

Rule 23 1. (f)

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment or error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

* * *

Questions Presented for Review

I

Press Coverage

(1) Where petitioner complains that his federal rights were abridged because he was tried at the time and place of his choice, and chose to assert no right in this connection in the state trial court, is the issue before this Court?

(2) May material be considered by this Court, if it was not part of the record certified by the lower court nor considered by that court?

(3) Was Petitioner deprived of any Due Process Rights by reason of alleged prejudicial press coverage:

(a) Where the offense occurred in one county and the case was transferred to another county for trial, and no prejudicial press coverage was shown in the county of the trial?

(b) Where press coverage actually shown consisted of reports of police investigations, arrests of suspects, and court appearances and contained no editorial comments, cartoons, nor mention of petitioner's extra-marital affair, although the last was shown at the trial?

(c) Where all of the 14 jurors selected to hear the case indicated that they had no opinion on petitioner's guilt or innocence?

(d) Where less than one fifth of the jurors questioned on voir dire indicated a feeling of petitioner's guilt?

II

Conspiracy—The Evidentiary Question

Was petitioner deprived of a federally protected right where a prima facie showing of a conspiracy was made and thereafter the state trial court admitted out of court declarations of a co-conspirator?

III

New Trial on Ground of Newly Discovered Evidence

Was Petitioner deprived of a federally protected right when the state trial court refused to grant a new trial on the

basis of newly discovered evidence, where the newly discovered evidence consisted of:

(1) Material which would go only to the credibility of witnesses, and,

(2) A recantation by a prosecution witness, who repudiated the recantation in open court?

Statement of the Case

The facts of the case are fully and accurately set out in the opinion of the court below, 139 N.W. 2d 490, appendix A of the petition herein, and respondent, pursuant to Rule 40 (3), waives the statement of the case except to point out the following: Pages 13 through 23 of the petition herein are taken from a letter, found on the person of the witness Anderson while he was in prison, and from an ex parte statement taken from Anderson by petitioner's counsel at the prison. As pointed out by the court below, both the letter and statement were repudiated by Anderson in a hearing on a motion for a new trial based on newly discovered evidence. At the hearing, Anderson reaffirmed the testimony given at the trial court, testifying that the letter and statement both resulted from threats he had received while at prison. (R. Vol. 8, p. 461, 474-476). The trial court, denying the motion, found that the letter and statement did in fact result from threats. (R. Vol. 1, p. LXXXIV). Petitioner's appeal from the denial of this Motion was consolidated with his appeal from the judgment, and both appeals were heard together by the court below.

ARGUMENT

Petitioner presents three issues to this Court which he says are of constitutional dimension and should be reviewed on a writ of certiorari. However, a careful reading of the petition shows that the courts below did not deny petitioner any federally protected rights. The petition, prepared by a member of the Bar of this Court with the aid of the petitioner's brother, seems to be directed more to engaging in repeated and calumnious personal attacks on the prosecutor than the raising of genuine constitutional issues. Like most personal attacks presented as arguments on the merits:

". . . . [I]t is a tale
. . . full of sound and fury,
signifying nothing."
—Shakespeare: Macbeth

I

Press coverage of the investigation and trial are not grounds for granting a writ.

A. The issue was not asserted in the trial court and therefore is not before this Court.

Petitioner was indicted for the offense in Ramsey County (St. Paul), Minnesota on June 25, 1963. (R. Vol. I, p. I). On August 27 petitioner moved to change the venue to Hennepin County (Minneapolis), but the motion was denied. However, on September 13, 1963, the Minnesota Supreme Court granted a writ of mandamus setting the venue in Hennepin County. *State v. Thompson* (I), 266 Minn. 385, 123 N.W. 2d 378 (1963). This decision determined that the trial would be held in Minneapolis, the largest city in Minnesota, and in the county of petitioner's choice. The record clearly shows that after the venue was changed to Hennepin County petitioner did not request either a continuance or a second change of venue, and the case proceeded in due course to trial.

Petitioner now urges that his Due Process Rights were violated because the case proceeded regularly to trial in Hennepin County. Assuming, without conceding, that petitioner was deprived of a federally enforceable right by being tried at the time when and place where he was tried, he did not assert any such right in the trial court. The rule in such a case is that if a litigant in a state court does not assert a federally protected right in the state trial court, he is deemed to have waived the right. Such a waiver binds the litigant and precludes him from a decision on the merits of the federal claim either in the state appellate court or before this Court. *Henry v. Mississippi,* 379 U.S. 443, 451 (1965).

In this connection, Supreme Court Rule 23 (1) f. requires a petitioner to specify the stage in the proceedings in the court of first instance at which, and the manner in which, the federal question was raised, as well as the method of raising them, ". . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Petitioner's failure to comply with this rule is apparent. He claims he had a federal right not to have been tried at the time and/or place he was tried, yet made no attempt to change either the time of the trial by motion for continuance (Minn. Stat. 631.02) or the place of the trial by motion for change of venue (Minn. Stat. 627.01)*

*Although the cited statute is susceptible to a construction that it allows only one change of venue, the clear implication of the holding of *Irwin v. Dowd* (II) 366 U.S. 717 (1961) is that such a construction would violate a defendant's Fourteenth Amendment Due Process Rights, if in the county to which the venue had been changed, a fair trial was impossible. It should be noted that *Irwin* (II) was cited by the Minnesota Supreme Court in its decision when it changed the venue of this action to Hennepin County. *State v. Thompson* (I) 266 Minn. 385, 389, 123 N.W. 2d 378, 381, (1963). Cf. also the statement by the Minnesota Supreme Court in its decision on this appeal to the effect that the cited statute would not be construed to prevent a second change of venue. 139 N.W. 2d at 514.

Petitioner was free to make either motion at any point during the voir dire, as soon as he realized, as he now claims, that an impartial jury was impossible. At such a point, remedial action would be meaningful in that it would correct the situation without the necessity of a new trial. Petitioner again had the opportunity to raise the issue in his three motions for new trial, but did not do so." (R. Vol. I, pp. LVIII-LXI, pp. LXV-LXVI, pp. LXX - LXXIV).

Petitioner concedes that the matter was not raised in the trial court, as required by *Henry* and Rule 23 (1) f. (Petitioner's brief, p. 32-34). He seeks to remedy this by a number of devices. First, he cites *Irwin v. Dowd* (I), 359 U.S. 394 (1959) apparently for the proposition that if any state court reaches the merits on a constitutional question, it is deemed raised for the purpose of review by this Court. This is a complete misreading of *Irwin,* in which the issue was whether or not the petitioner had exhausted his state court remedies for the purpose of filing a writ of habeas corpus in the federal district court. This Court held that if the state supreme court discussed the merits of a constitutional claim in such a way as to settle it, but technically held that the issue need not be decided, then the matter is deemed to have been exhausted by the state courts, and the petitioner may then petition for a writ of habeas corpus in federal court. It can be seen that *Irwin* in no way relates to the question of raising issues in time for the state courts to rule fairly upon them. It deals not with the raising of issues, but with the settling of them. In fact, while in the state court, the petitioner *Irwin* sought and received one change in venue, but then moved unsuccessfully three more times for a change of venue and eight times for a continuance. See *Irwin v. Dowd* (II), 366 U.S. 717, 720 (1961). Clearly the issue was raised in the

trial court. This, of course, is in contrast to the case at bar, where petitioner neither moved to change the venue nor continue the action once the venue was changed to Hennepin County. Respondent submits that *Irwin* in no way relates to the issue and that the proper rule is set out in *Henry v. Mississippi, supra,* and Rule 23 (I) f.

It should be noted that the Minnesota Supreme Court did not discuss the Fourteenth Amendment due process issue, as petitioner contends. The court discussed the issue of a fair trial before an impartial jury, which right is guaranteed all defendants by Art. I, §6 of the Minnesota State Constitution. The Minnesota Court found that since petitioner had selected the location of the trial, there was no alleged error upon which it could rule.

> ". . . [H]aving gone as far as we did in this case in permitting the defendant to choose his own county, we do not know what more we could have done." 139 N.W. 2d 514.

Finally, petitioner attempts to gloss over his refusal to present the issue to the trial court by blaming the state for not continuing the action or removing it to federal court. These procedures, while perhaps helpful to this petitioner, would certainly be considered extremely harmful by other criminal defendants. Any doctrine which gives the prosecution the power to continue actions indefinitely would certainly violate a defendant's right to a speedy trial, as guaranteed by Minnesota Constitution, Art. I §6, and the United States Constitution, Sixth Amendment. The right to a speedy trial is for the accused's benefit, and he alone should be allowed to waive it. The other improvement on criminal procedure suggested by petitioner—removal to the federal court

on motion of the prosecution—is so fanciful as to defy analysis.

Respondent submits that since petitioner chose not to assert in the trial court any federal right concerning alleged prejudicial press coverage, he has waived any such right, and is precluded from a decision on the merits of the claim before this Court.

B. The issue of press coverage is not fairly raised in the record before this Court.

Almost all of petitioner's argument on the issue of press coverage is based on material outside the record. When material not presented to the lower court and not certified to this Court is presented for review, it has long been the rule that such material may not be considered by the Court. Thus, in *Lawn v. United States,* 355 U.S. 339 (1958), petitioners were convicted of income tax violations and the convictions affirmed by the court of appeals. When the case came before this Court on certiorari, the Government filed with the Court a transcript which was not part of the record of the lower court. Petitioner Lawn moved to strike the transcript and the portion of the Government's brief relating to it. This Court granted the motion saying:

> "That motion must be sustained as we must look only to the certified record in deciding questions presented." *Id.* at 354.

The dissent agreed with this ruling. *Id.* at 366.

This rule is not new. Over sixty years ago, this Court held:

> [B]ut before the questions presented and decided at such a [lower court] hearing can be re-examined on a writ of error, they must be brought into the record, by a bill

> of exceptions or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose. . .
> . . . The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. . ."
> *England v. Gebhardt,* 112 U.S. 502, 505 (1884).

In *Ciucci v. Illinois,* 356 U.S. 571 (1958), the defendant had been convicted of murder in the first degree in a state court. Upon affirmance by the state supreme court, the matter came before this Court on certiorari. In his brief to this Court, the petitioner appended a number of articles which had appeared in Chicago newspapers prior to the trial of the cause. "Neither these articles nor their subject matter [was] included in the records certified to this Court from the Supreme Court of Illinois." 356 U.S. 573. In a per curiam opinion, this Court affirmed the conviction. The majority opinion noted:

> "Mr. Justice Frankfurter and Mr. Justice Harlan, although believing that the matters set forth in the aforementioned newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here." *Ibid.*

In his petition to this Court, petitioner has referred to the following matters outside the record:

(1) Appendices to the petition:

> (1) Appendix D. 42 extracts from St. Paul newspapers.

(2) Appendix E. An article in the *Saturday Evening Post* magazine, September 14, 1963.

(3) Appendix F. An article in *Newsweek* magazine, July 1, 1963.

(4) Appendix G. An article in a St. Paul newspaper, April 14, 1966.

(2) Items not certified as part of the record by the Minnesota Supreme Court, one of which was filed by petitioner with this Court:

(1) Petitioner's pro se "Brief and Affidavit," admittedly not part of the record. (Petitioner's Brief, p. 33).

(2) Transcript of voir dire jurors not selected, "certified" by the court reporter, but not by the Minnesota Supreme Court, as it was not filed by petitioner there nor was it considered by that court. It, too, is admittedly not in the record. (Petitioner's brief p. 34).

The rule that matters not in the record will not be considered by the reviewing court is not based solely on a sense of fairness, first, to the lower courts in allowing them to rule before they are reviewed and, second, to the other parties by allowing them to rebut material on the record against them. It is also based on the pragmatic reason that material eased into the files at the last minute has not been refined by earlier litigation and may not be as accurate as it might be had it been put in the record in the course of trial. The case at bar shows that such reasoning is well founded. Thus, petitioner's appendix E, the *Saturday Evening Post* article which petitioner solemnly represents as "reproduced in full" (petitioner's brief, p. 30) leaves out the following subtitle written in large print at the top of page 76, immediately over the

picture of petitioner: "I PRAY THE GUILTY WILL BE BROUGHT TO JUSTICE." It also leaves out certain pictures of petitioner in both his home and office which were obviously taken with his consent.

All the appendages in appendix D are excerpts. Some, like A3 and A4 have excised portions not indicated by ellipses. Since all are excerpts, they must necessarily represent a process of selection and concentration. Appendage A26, which petitioner represents is on page 24 of the *St. Paul Dispatch* of June 19, 1963 is not on page 24 or on any other page of that edition, nor is it on page 24 of the June 17, June 18, June 20 or June 21 editions of that paper. Perhaps with a more careful citation it might be found, but as it is presented to this Court, respondent is unable to locate the alleged article. Appendage A1, although it is presented in the petition as relating to petitioner's case, when read in its entirety is found to be a news article of a study, opposing capital punishment, released in Chicago on the date the story was printed. It in no way relates to petitioner. The First Amendment dangers of suppressing such a story as prejudicial to petitioner are apparent. The second paragraph of appendage A6 is not found in the same article as is the first paragraph of the same appendage (or anywhere else in the same article for that matter) although petitioner makes it appear as if the two paragraphs are consecutive.

Appendages A14, A31, and A38, presented to this Court as separate news articles, are in reality three excerpts from the same article. Appendages A13 and A30 are from another single article. Appendages A15 and A32 are similarly treated. And Appendages A6, A7 and A8, although also presented as three different articles (complete with three different headlines) are in reality three excerpts from the same article.

The transcript of the voir dire of jurors not selected, along with the record of jurors selected, could be read to be a complete transcript of all that occurred between October 28 and November 1, 1963. It omits much of what in fact occurred, including the trial court's instruction to the press and jury about their conduct during the trial.

Other distortions and omissions occur, but the above discloses the basic evil of which respondent complains: Since the matter is not in the record, it is not presented to this Court with the highest degree of accuracy.

Therefore, on the authority of *Ciucci v. Illinois, supra,* respondent hereby moves to strike all of Appendix D, Appendix E, Appendix F, and Appendix G; and on authority of *Lawn v. U. S., supra* and *England v. Gebhardt, supra,* moves to strike from the record respondent's pro se "brief and affidavit" and the transcript of voir dire of jurors not selected. Respondent further moves, on the authority of the above cited cases, to strike all references to all the above material in petitioner's petition. If respondent's motion is granted, it will be clear that the records certified to this court will show that no federal right of petitioner was abridged, as the material portions consist of a voir dire of fourteen jurors, none of whom had any opinion as to the guilt or innocence of petitioner.

C. Even if the material outside the record is considered, no federally protected right of petitioner was abridged.

Respondent urges that the issue of press coverage was not seasonably raised and that it is not embodied in the record before this Court. Assuming, arguendo, that it had been raised seasonably, and further assuming that it had been embodied in the record, no federally protected right of petitioner

was abridged. The following analysis is presented on the assumption that this Court denies respondent's contentions in Section IA and IB above, and respondent in no way intends to waive either of these contentions.

At the outset, it should be noted that Due Process does not require that the jury be totally ignorant of the cause:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and *scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.* This is particularly true in criminal cases." *Irwin v. Dowd* (II), 366 U.S. 717, 722, 723 (1961) (Emphasis supplied).

Moreover, Due Process is not offended if a juror has a preconceived notion of the guilt or innocence of the accused, provided that the juror can honestly lay the impression aside.

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

1. The examples of alleged prejudicial press coverage did not reach the jury.

Petitioner has set out 42 excerpts from St. Paul daily newspapers and two articles from national magazines.* Of the

*Appendix G, a newspaper article dated April 14, 1966, is, as opposed to the other appendages to the petition, accurately reproduced. However, as it is of dubious relevance to the case, it will not be discussed.

twelve jurors who deliberated on the case and returned the verdict, none were shown to have read any of the newspaper articles of which petitioner complains, or even any St. Paul newspapers, for that matter. Five were asked whether they had read about the case in the St. Paul papers. All replied they had not. (R. Vol. 8, pp. 96, 128, 169, 176, 191). This is in contrast to *Sheppard v. Maxwell*, 34 U.S.L. Week 4451 (U.S. June 6, 1966) in which seven of twelve jurors received the offending newspapers. Two jurors had read the article in the *Saturday Evening Post*. (R. Vol. 8, p. 104 and 105, 221). One had not read the article but had looked at the pictures (R. Vol. 8, p. 202, 222). None were shown to have read the *Newsweek* article. Thus, the "massive" publicity which petitioner brings to the attention of this Court consists of one magazine article, published almost three months before the verdict was returned, read by two jurors and glanced at by a third.

An examination of the proceedings in the trial court shows what had happened. Petitioner evidently felt that the publicity in St. Paul was prejudicial; he has appended examples of such St. Paul publicity to the petition. On petitioner's motion, venue was changed to Hennepin County, the seat of which is Minneapolis. Minneapolis is a larger city than St. Paul and has two newspapers of its own, *The Tribune* and *The Star*. (See R. Vol. 8, pp. 190, 201). The wisdom of petitioner's move was obvious; none of the jurors selected had read the St. Paul papers. Only seven of the one hundred and twelve jurors questioned on the voir dire had read the St. Paul papers, (Scheid transcript, not in record). It should be noted that petitioner has not appended to his petition any excerpts from the two Minneapolis newspapers, i.e., the papers which serve the area from which the jurors were drawn.

In this connection, it should also be noted that petitioner does not allege that there was prejudicial press coverage during the trial (Cf. *Sheppard v. Maxwell, supra*), or even in the period immediately preceding it. The selection of jurors started October 28, 1963. The last article selected by petitioner is the *Saturday Evening Post* article dated September 14, 1963. The last newspaper excerpt selected by petitioner was published on August 26, 1963, while the great bulk of the excerpts were published in April, May and June, 1963, at least four months before the case proceeded to trial.

It is clear that petitioner has failed—even by roving far beyond the record—to set out any press coverage which reached the jury with such impact as to deny him due process.

2. *The content of the pre-trial press coverage was not of such a nature as to deprive petitioner of Due Process.*

In contrast to *Irwin v. Dowd,* (II), *supra,* and *Sheppard v. Maxwell, supra,* the press coverage set out by petitioner contains no editorials urging that he be arrested and prosecuted or that he be "grilled". No cartoons against petitioner appeared. There was no mention of any confession, prior criminal record, or offers to plead guilty to a lesser offense (as there were in *Irwin*), as petitioner had made none. There was no mention of petitioner's extra-marital affair with Jackie Oleson, even though evidence of this affair was properly introduced and received at the trial.

As the appended excerpts show, the pre-trial press coverage consisted of reports of the progress of the police investigation, of the arrest of suspects, and of the preliminary court appearances. If any news reporting of criminal cases is to be suppressed, the most caution should be exercised in sup-

pressing these reports. The dangers attendant on suppressing stories of arrests, custody, and court appearances are apparent.

A reading of the excerpts appended to the petitioner, selected and concentrated as they are, shows that the press coverage was not nearly of the order of *Irwin* and *Sheppard*. Even if it be assumed that the appended articles had been read by the jurors who sat on the case, the content of these articles was not of such a nature as to implant in them an unconscious prejudice against defendant.

3. *None of the jurors who sat on the case indicated any bias against petitioner.*

In contrast to *Irwin v. Dowd* (II), *supra*, where eight of the twelve jurors thought that the defendant was guilty, 366 U.S. 727, all of the jurors who sat on this case stated that they had no opinion as to petitioner's guilt or innocence, when questioned during the voir dire. Three admitted an opinion at one time, but stated they had given it up. It is true that such statements must be considered in light of all the factors surrounding the trial, but the contrast with the *Irwin* jury is apparent. The *Irwin* jurors stated that they could be fair and impartial to Irwin but eight of them stated with an opinion of guilt. In contrast, not only did all of the jurors in this case state that they could be fair to petitioner, they went further and stated that they had no opinion as to his guilt or innocence.

4. *An analysis of the voir dire does not show a deep and bitter prejudice against petitioner.*

Two points should be noted in this connection. First, neither 83% nor 65% of the prospective jurors questioned

were shown to be actually biased against petitioner, as he contends. Respondent agrees with petitioner that 112 prospective jury men were questioned. However, in no way is the relevant total either 81 or 103 as petitioner argues. His mathematical computations seem to bear no relation to his reasoning. Analysis of the voir dire panel in this connection is for the purpose of determining how many of the persons questioned are biased against the defendant, as a rough way of measuring community feeling. In this respect, it is similar to a public opinion poll. The relevant total is the number of persons who are asked, and who respond to, the question concerning any bias concerning the defendant. Once they answer this question, their opinion is registered and it is irrelevant whether or not they are later excused for miscellaneous reasons such as elderliness or health or whether or not they are challenged by the prosecution because they are related to the family of the decedent. It is also irrelevant if they are later challenged peremptorily by either side. Hence, here the relevant total is the number of prospective jurymen who are asked whether they had any opinion as to petitioner's guilt or innocence, which number here is 109. Of these, 66 stated that they had an opinion as to petitioner's "guilt or innocence," while 43 affirmatively indicated that they had no opinion. Of the 66, 20 indicated that it was a feeling of guilt while 46 did not specify whether their feelings were either guilt or innocence. Petitioner's statement that 67 talesmen expressed an opinion petitioner was guilty is a misstatement of fact. Thus, about 61% had *an opinion* on petitioner's guilt or innocence, while about 18% —not 83% or 65% as petitioner avers—expressed an opinion that he was guilty. This is in contrast to *Irwin*, where almost 90% of those examined "entertained some opinion as to guilt," 366 U.S. 727.

It may be that there is a material discrepancy between the figures supplied by respondent and petitioner. If so, this is one of the attendant hazards in considering material not on the record, and respondent urges this an additional reason to grant its motion, *supra* IA, to strike all the material not in the certified record.

The second point which should be considered in this connection is that a number of jurors challenged for cause could have actually sat on the jury without denying petitioner Due Process. Due Process does not require that a jury have a totally blank mind; it allows a preconceived notion of guilt or innocence, provided the jurors can honestly lay it aside. *Irwin v. Dowd,* quoted *supra.*

> "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him." Chief Justice Marshall, 1 Burr's trial 406 (1807), quoted in *Irwin v. Dowd,* supra, 366 U.S. at 722.

Although petitioner assures us that 67 jurors were challenged for cause because they expressed an opinion that he was guilty, of the total of 68 who were challenged by both sides for cause, one was challenged by petitioner apparently because he was related to Minneapolis police (Scheid transcript, p. 276). One was challenged by petitioner because she worked in a neighborhood in St. Paul not far from where the murder occurred (*Id.* at 465), and one was challenged by respondent because of a relationship to the decedent (*Id.*

at 134, 139). The remaining 65 were challenged for cause because of an opinion they had concerning the guilt or innocence of petitioner.* Of these 65, respondent opposed two challenges, but the triers found the challanges true. The other 63 challenges were not opposed by respondent. Some of these, however, had the challenge been found not true, could have sat on the jury without denying petitioner any Due Process rights, because their "opinions" appeared to be nothing more than preconceived notions about the case. Thus, in the questioning of juror LaVonne L. Blount, the following took place:

> "Q. I take it from what you read, you formed some opinion as to this man's guilt in this case, have you not?
>
> "A. Sort of general.
>
> "Q. You have some feeling, do you, about his guilt as you sit here today?
>
> "A. (Pause) Well, yes, some way or other.
>
> "Q. And you feel it would take— In your mind it would take some evidence to remove that opinion, is that right?
>
> "A. Yes." (*Id.* at 15, 16)

In the questioning of Beulah G. Callahan, the following occurred:

> "Q. I take it you formed some opinion as to the guilt of this man as a consequence of your reading?
>
> "A. Yes, I would say I have.
>
> "Q. And it would be that kind of opinion which would take evidence to remove? In other words, you feel that you would have to hear something to the contrary before you could change that opinion?

*The other juror who expressed an opinion and is included in the sixty-six figure of those with an opinion, *supra*, was juror Ann Duff, who had a "Sort of an opinion," which would not take any evidence to remove. (*Id.* at 279). She was not challenged by petitioner for cause, but was peremptorily challenged by him. (*Id.* at 279, 280).

"A. I would say so." (*Id.* at 112)

The questioning of juror Gladys C. Peterson:

"Q. Have you formed some opinion as to the guilt or innocence of Mr. Thompson based upon what you have read in the papers and in the Saturday Evening Post?

"A. No, not—. I just don't know.

"Q. Do you have some feeling in your mind one way or the other in regard to this matter.

"A. Oh, yes, in a way. It's just like watching a TV program that's being postponed until next week or something.

"Q. And you haven't quite reached the answer to it yet, but you have some ideas in your mind about this matter, do you?

"A. Yes.

"Q. And you would want to have those ideas overcome in this courtroom before you would be satisfied, is that right?

"A. Yes.

"Q. I take it then that you don't have a competely open mind about the matter, having these ideas?

"A. No, I can't say that I do." (*Id.* at 407, 408).

Of course, all of the above answers were given without any instruction by the trial court as to the presumption of innocence and the burden of proof beyond a reasonable doubt. These statements show hardly more than a preconceived notion as to guilt or innocence which the Fourteenth Amendment allows, and these jurors could have sat without offending Due Process. Thus, the figures of 65 as those challenged because they had an opinion on the case is as high as it is because respondent did not insist on asserting all it could have consistent with Due Process, but instead agreed to a higher standard, that of not opposing challenges to those jurors who had a mere preconceived notion of the

guilt or innocence of petitioner. As a result of respondent's position, petitioner was not compelled to use as many peremptory challenges as he might have, had respondent not acquiesced in his challenges. Thereby, when the jury selection was completed, petitioner had not exhausted all his peremptory challenges. (See Scheid transcript).

In conclusion, respondent reminds the court that criminal cases are not tried in a vacuum and that the press will, and has a right to, cover these cases. *Irwin v. Dowd, supra,* 366 U.S. at 722, 723. In light of these facts, respondent submits that petitioner has fallen well short of any showing that his Due Process rights were violated.

II

The admission of a co-conspirator's declaration did not violate any of petitioner's federally protected rights.

Petitioner urges that certain out of court declarations of Norman Mastrian were erroneously admitted in evidence, apparently in violation of petitioner's Due Process rights. His reasoning is not made clear, but since he is relying on the Sixth and Fourteenth Amendments, it is apparently as follows: (1) The Sixth Amendment's Right to Confrontation applies to the states by virtue of the Fourteenth Amendment Due Process clause. (2) The admission of Mastrian's declarations was in violation of the Right to Confrontation.

Respondent agrees that the Sixth Amendment's Right to Confrontation applies to the states by virtue of the Fourteenth Amendment Due Process clause. This was settled beyond peradventure in *Pointer v. Texas*, 380 U.S. 400 (1965). The question is whether the admission of this testimony would violate the Sixth Amendment were it introduced in federal court.

The general rule on conspiracy evidence in federal courts is set out in *Lee Dip v. United States*, 92 F. 2d 802 (9th Cir. 1939), cert. denied, 303 U.S. 638, in which the court held:

> "Where there is proof of concert of action between two or more persons in the commission of an offense, the acts and declarations of one are admissible against the other, although no conspiracy has been charged." 92 F. 2d 803.

Accord, *United States v. Annunziato*, 293 F. 2d 373, 378 (2d Cir. 1961), cert. denied, 368 U.S. 917. Cf. also *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948), (Civil Action under the Sherman Act). Only a prima facie showing of the conspiracy need be made. *Hansen v. United States*, 326 F. 2d 152, 156 (9th Cir. 1963). Cf. *United States v. United States Gypsum Co., supra*, 333 U. S. at 389.

The above federal rules are identical with the general rules on the topic, 16 Am. Jur. 2d, Conspiracy, §38, p. 147, and with the Minnesota rules, *State v. Thompson* (II), *supra*, 139 N.W. 2d at 502, 503.

Thus even assuming for the purposes of this petition that the Sixth Amendment incorporates the entire federal practice with respect to hearsay rules, and the Fourteenth Amendment applies them to the States, no change will be effected in Minnesota law. As can be seen from the opinion of the court below, the law which has already been applied to this case is identical to federal law. What petitioner is asking this Court to do is reapply the law already twice applied to the case.

Respondent submits that a prima facie showing of conspiracy was made out, aliunde the Mastrian declarations. As petitioner concedes, it was shown that Carol Thompson was murdered on March 6, 1963. Petitioner was not at the scene

of the crime. Could the trial court, without using the hearsay declarations, make a finding that petitioner was working in concert with whoever it was that committed the murder? The following, most of which appears in the opinion of the court below, should be considered in answering this question:

(1) There was $1,061,000.00 in insurance on decedent's life, payable to petitioner in the event of her accidental death. $1,055,000.00 of this was taken out by petitioner within 13 months of the offense, which was committed on March 6, 1963. The expiration dates of the term policies amounting to $705,000.00 were March 15, April 4, April 10, May 1, June 1, and June 13, 1963. (139 N.W. 2d 496, 517). Petitioner spread these term policies over three different agents, taking out no more than $350,000.00 with any one. (*Id.* at 517). He made misrepresentations to the agents to the effect that there was less insurance on decedent's life than there in fact was. (R. 202; St. Ex. Z, R. 530; St. Ex. II, R. 580; St. Ex. EE, R. 540).

(2) January 24, 1963 petitioner removed the family Dachshund which acted as a watch dog because it barked whenever visitors approached the house. (R. 680-82, 859). This was done without decedent's knowledge. (R. 2339-40).

(3) March 4, 1963, petitioner removed one of the two telephones from the home. (R. 2024, 2025). Regardless of Anderson's testimony on this matter, it remains that decedent might have used this phone, which had been located in the bedroom, (R. 670) to summon aid.

(4) Petitioner was involved with Jackie Oleson and asked her to marry him in August, 1962. (R. 735). In February, 1962, petitioner asked Jackie for 11 or 12 months to arrange his affairs to be able to divorce the decedent. (R. 768)

(5) Petitioner's early arrival at his office (139 N.W. 2d 503) on the date of the offense. Regardless of Anderson's testimony, an inference that petitioner wanted an alibi arises.

(6) Petitioner locked the front door of the house on the date of the offense, which was extremely unusual. (*Ibid.*)

(7) Petitioner had numerous phone calls from, and several meetings with, Norman Mastrian, who began soliciting for a hired killer in February, 1963. (*Ibid.*) (Mastrian's statements in ths respect are verbal acts and are admissible with respect to the conspiracy rule.)

(8) March 20, 1963, petitioner paid $2,500.00 in $100.00 bills to Mastrian through another attorney. Although he explained that this was the return of a retainer from Mastrian, petitioner admitted that he had done considerable work for Mastrian yet had had no accounting with him. (*Ibid.*) Petitioner's argument that using another attorney would leave evidence cannot gloss over the fact that this is a most unique way to return a retainer. Most lawyers use checks, but checks have to pass through numerous hands in banks and other financial institutions. The use of a third party to pay cash, rather than make a face-to-face payment from petitioner to Mastrian, is the obvious result of a plan to have petitioner and Mastrian avoid each other after the accidental death scheme fell apart.

(9) Petitioner had numerous stock transactions with Mastrian which resulted in substantial loss to petitioner and a gain to Mastrian. (*Ibid.*)

The trial court and the Minnesota Supreme Court, applying identical rules as are applied by federal courts, found a prima facie showing was made. Petitioner has offered explanations and justifications for much of the above. However, in determining whether the foundation evidence makes a

prima facie showing, the question is not whether it was or was not adequately explained away by the end of the trial. It is whether, assuming the trial court judge believed the foundation evidence and any reasonable inferences which could be made from it, and disbelieved any contradictory evidence, he could have found that the petitioner acted in concert with whoever it was that murdered his wife. Once such a finding is made, the rule is satisfied and the hearsay declarations are admissible. Respondent submits that the trial court was correct when it ruled that such a showing had been made. Therefore, even assuming the matter were of constitutional dimension, there has not been any abridgment of petitioner's federally protected rights.

III

The trial court's refusal to grant a new trial on the ground of newly discovered evidence did not deprive petitioner of a federally protected right.

Petitioner argues that the trial court erred when it denied his motion for a new trial based on newly discovered evidence. He alleges this ruling to be a denial of a federally protected right. The newly discovered evidence is of two types:

(A) The disposition of the charges which were pending against four witnesses when they testified in petitioner's trial.

(B) Witness Anderson's recantation and subsequent repudiation of the recantation.

Before examining the applicable law, it should be noted that in the trial the court followed the "Jencks" procedure (Cf. 18 U.S.C. §3500) and ordered respondent to turn over to petitioner's counsel the pretrial statements of all the witnesses in question during the cross-examination of them. On

appeal, the Minnesota Supreme Court adopted this procedure as part of the law of the state. *State v. Thompson* (II), *supra*, 139 N.W. 2d at 512.

Certain general rules govern the granting of a new trial on the ground of newly discovered evidence. Two of these are succinctly stated by the Court in *United States v. Lombardozzi*, 343 F. 2d 127 (2d Cir. 1963), cert. denied, 381 U.S. 938:

> "The grant or denial of a motion for a new trial is largely within the discretion of the trial court. Furthermore, such motions are 'not favored and should be granted only with great caution'. [Citation]." 343 F. 2d 128.

That the matter is addressed to the discretion of the trial court, accord, *Connelly v. United States*, 271 F. 2d 333, 334 (8th Cir. 1959), cert. denied, 362 U.S. 916.; *Gallegos v. United States*, 295 F. 2d 879, 881 (9th Cir. 1961), cert. denied, 368 U.S. 988. That such motions are not favored, see also *Connelly v. United States*, *supra*, 271 F. 2d at 334.

A. The disposition of the charges pending against witnesses Ingram, Sharp, Butler and Morris is not newly discovered evidence such as to entitle petitioner to a new trial.

Petitioner argues that the disposition of the criminal charges pending against the above four witnesses is ground for a new trial. He cites *Napue v. Illinois*, 360 U.S. 264 (1959), as controlling. *Napue* stands for the proposition that Due Process is offended if a prosecution witness giving important testimony also testifies that he did not receive any promise of consideration in return for his testimony when in fact he had, and the prosecutor knows it yet makes no attempt to correct the false testimony. Under this holding four elements must appear: (1) Testimony that no con-

sideration was given; (2) Consideration which was in fact given; (3) The prosecutor's knowledge of the consideration; (4) The failure of the prosecutor to correct the record.

Respondent agrees that (1) the witnesses testified that no promises were given and (2) that the prosecutor did not disagree with this testimony. However, there is not any evidence that any "deals" were made, and that if any were, that the prosecutor knew of it. The witnesses were all extensively cross-examined by petitioner's counsel, who had copies of the statements the witnesses had given to the police shortly after they were arrested and before they had any opportunity to confer with each other. No material discrepancies and no evidence of any "deals" were found. Petitioner's frenzied libeling of the prosecutor does not mask the fact that there is no evidence of any "deals" anywhere in the record. By contrast, in *Napue* the prosecutor actually admitted a promise of reduction of sentence, in a post-conviction proceeding undertaken by the prosecutor in behalf of the witness. Petitioner is asking this Court to infer that "deals" were made. Petitioner raised the identical argument before the trial judge. (R. Vol. I, p. LXXXI). The trial judge, ruling on the motion, noted that, "In response to the moving papers of defendant, the State has presented counter affidavits, statements and transcripts of testimony controverting the truth of defendant's moving papers." (*Id.* at LXXXII). The documents filed by the State, which are also of record in the court below, include affidavits of the prosecutor, William B. Randall, the witnesses Morris, Sharp, Ingram and Butler, and the attorneys who represented Morris, Sharp and Butler. Some 66 affidavits and exhibits were filed by the State, in the words of the trial judge, controverting the truth of defendant's moving papers. The trial court, who presided

over both the trial and the later hearing on a motion for a new trial, made the following finding:

> "The alleged promises of reward to Anderson, Morris, Sharp, Ingram and Butler, and the alleged leniency granted to each except Anderson, are at best inferences that they were encouraged to cooperate. In this case, there is absolutely no foundation for a conclusion that anyone induced either or any to testify falsely on behalf of the State, nor is there any showing that either or any did in fact falsify as to material matter. While the Court appreciates that all these men are criminals and that their credibility is subject to question, nevertheless, such was submitted and considered by the jury. No proposed 'newly discovered evidence' on this contention has been shown, and it is therefore rejected. (R. Vol. I, p. LXXXIV)."

The controlling rule is that upon a motion for a new trial on the ground of newly discovered evidence, the trial court's ruling should not be disturbed except under the most extraordinary circumstances, *Newman v. United States*, 238 F. 2d 861, 862, 863 (5th Cir. 1956). Nevertheless, petitioner continues to urge that the trial court's findings be disregarded, solely because of the disposition of the charges pending against the witnesses. If petitioner's contention is valid, it would mean that every time any witness who had a criminal charge pending against him testified, he would have to be dispatched to prison, lest the verdict in the case in which he testified be upset. In order to safeguard the verdict, prison would necessarily result in spite of any and all disclaimers of promises by the prosecutor and witnesses and in spite of any findings by the trial court that there were no promises. Prison would necessarily result in spite of the results of any presentence social and psychological investigation by trained personnel in the witnesses' own case.

Respondent certainly has no quarrel with the holding of *Napue*, other than to point out it has no relation to the facts of this case. Since there is no evidence of any kind showing that the witnesses were offered any "deals", the sole newly discovered evidence concerning witnesses Morris, Sharp, Ingram and Butler is the disposition of their cases. This evidence does not go to prove or disprove petitioner's guilt or innocence; it would merely go to the credibility of the witnesses. Even assuming that this matter were one of constitutional dimension, and could be reviewed by this Court on certiorari to a state court, it can be seen that the trial court acted correctly. The rule is clear that newly discovered evidence which goes merely to the credibility of the witnesses is not ground for a new trial. *United States v. Lombardozzi, supra*; *Beyda v. United States*, 324 F. 2d 526, 531 (9th Cir. 1963). Respondent submits with respect to the witnesses Morris, Sharp, Ingram and Butler, there is no ground for granting petitioner a new trial.

B. Anderson's recantation and subsequent repudiation of the recantation is not ground for granting a new trial.

After petitioner and Mastrian were convicted, Anderson entered a plea of guilty to murder in the first degree. He was incarcerated in the state prison where Thompson and Mastrian had previously been sent. Sometime after Anderson arrived at the prison, authorities found on his person a partially completed letter addressed to the Governor of the State and the Chief Justice of the state supreme court. In this letter he recanted his testimony at the trial and completely exonerated petitioner. On July 8, 1964, the attorney who was handling petitioner's appeal to the state supreme court went to the prison, with a court reporter, to take a

statement from Anderson. The statement was taken at the prison with no attorney representing respondent. (R. Vol. 8, p. 360). In this statement Anderson reiterated what he had stated in the letter. Sometime thereafter Anderson was removed from the prison. The state supreme court remanded the case to the trial court, an appeal having been perfected in the interim, with instructions to hold a hearing on a motion for newly discovered evidence. At the hearing, in which Anderson was cross-examined by both counsel for petitioner and for Mastrian, Anderson repudiated both the letter and the statement made at the prison and testified that what he had said at the trial was true. (R. Vol. 8, pp. 446 *et seq.*). He testified that threats had been made on his life by Mastrian in the prison (*Id.* at 474) and that other threats had come from Thompson through the other inmates in the prison (*Id.* at 475). He testified that these threats were the sole reason why he wrote the letter and gave the statement to petitioner's counsel. (*Id.* at 461, 476). Petitioner now urges that based on this recantation and repudiation of the recantation he should be granted a new trial.

If courts look with disfavor upon motions for new trial based upon newly discovered evidence, they look with suspicion upon any motion grounded upon a recantation. *Johnson v. United States*, 291 F. 2d 150 (8th Cir. 1961), cert. denied, 368 U.S. 880. The rule that the findings of a trial judge, ruling on a motion for a new trial based on newly discovered evidence should be entitled to great weight, applies with more force when the trial judge is asked to reconcile conflicting evidence. *Connelly v. United States*, *supra*, 271 F. 2d at 335; *Newman v. United States*, *supra*, 238 F. 2d at 863; *Johnson v. United States*, *supra*, 291 F. 2d at 154.

In this case, the findings of the trial judge, at the conclusion of the final motion for a new trial, were clear. The court found that the letter addressed to the state officials and the statement given to petitioner's counsel were compelled by threats communicated to him by other inmates as having come from Thompson and Mastrian. The court said that, in its opinion, had Anderson not been incarcerated in the same institution as were Thompson and Mastrian, the statement and the letter would never have been forthcoming. (R. Vol. I, p. LXXXIV). The court found that Anderson's testimony at the trial was true and that his recanting letter and deposition were false. (*Id.*, p. XC).

The case of *Newman v. United States*, *supra*, is apposite. In this case the defendant was convicted of illicit whisky operations largely on the testimony of a paid government informer. The defendant then moved for a new trial based on newly discovered evidence. Attached to the motion was an affidavit of the informer to the effect that his trial testimony was false. Upon a hearing on the motion the informer subpoenaed by the Government, took the stand presumably to test the circumstances leading up to the recantation in the affidavit. A lawyer for the informer appeared and advised the latter of his right against self-incrimination. Without giving any testimony on the matter, the informer was excused as a witness on his plea of self-incrimination. The trial court denied the motion for a new trial. On appeal to the court of appeals, the trial court's ruling was affirmed. The court held that a recanting affidavit does not automatically lead to a new trial. Stating that the matter was within the discretion of the trial judge, the court held that there was ample basis for the trial judge to conclude that the trial testimony and not the affidavit was true. The case at bar is a stronger case than was *Newman*. In *Newman*, the

trial court had merely the original testimony and a recanting affidavit. In the case at bar, there is the original testimony, the recanting statement and letter, and the subsequent repudiation of the recantation by Anderson when called upon to testify by petitioner.

Johnson v. United States, *supra*, is also apposite. In that case defendant was convicted of the crime of falsely making and counterfeiting federal reserve notes with intent to defraud. The evidence showed that the crime had been committed by a conspiracy, and the wife of one of the co-conspirators testified against defendant. After his conviction defendant moved for a new trial based upon the contention that the wife had given false testimony. Attached to the motion for a new trial was the wife's affidavit that her testimony at the trial was erroneous. At the hearing on the motion the wife testified in support of the motion. The trial court denied the motion, finding that the testimony at the trial was correct and that the recantation was not worthy of belief, possibly being the result of a suggestion by the defendant. 291 F. 2d 154. On appeal, the court of appeals affirmed the denial of the motion for a new trial. The court said:

> "Courts look upon recantation with suspicion. The trial court, which has had the witness before it, is in a much better position to determine where the truth lies than an appellate court. An appellate court should not interfere with the trial court's findings which have evidentiary support. Motion for a new trial based upon factual considerations should not be tried de novo upon appeal." *Ibid.*

Petitioner's citation of *Douglas v. Alabama*, 380 U.S. 415 (1965), as being very much like the case at bar can only be the result of a complete misreading of *Douglas*. In that

case the defendant had been indicted on a charge of assault with intent to commit murder. An accomplice had been found guilty in a previous separate trial and was called by the State to testify against the defendant. The accomplice, planning an appeal, invoked his privilege against self-incrimination when the State started to question him on the material elements of the charge. The trial court declared the witness a hostile witness and gave the State the privilege to cross-examine him. The prosecutor then produced a statement which purported to be the confession of the accomplice. Under the guise of cross-examination to refresh the accomplice's recollection, the prosecutor read the entire statement in the presence of the jury, pausing every few minutes to ask the accomplice whether he made that statement. Each time the prosecutor did so, the accomplice asserted the privilege and refused to answer. This Court held that such a procedure violated the Due Process. The distinctions between *Douglas* and the case at bar are evident, and only a few will be touched upon here. In *Douglas*, the witness was called by the prosecution. In the motion for new trial herein, the witness was called by the petitioner who was permitted to cross-examine his own witness. In *Douglas*, the case was tried before a jury which very likely could have believed that the prosecutor's reading of the statement was, in fact, evidence. In the case at bar, the matter was heard by a trial judge, and the questions which Anderson refused to answer could have in no way been taken as substantial evidence. Finally, in *Douglas* this Court pointed out that the primary object of the constitutional provision in question was to prevent the use of ex parte affidavits in lieu of personal direct and cross-examination. In the case at bar, if there was anything ex parte, it was the material presented by petitioner;

certainly nothing ex parte can be attributed to respondent in this connection.

As can be seen, the entire discussion concerning Anderson's recantation and repudiation has assumed that the matter is one of constitutional dimension. Petitioner has cited no authority holding that this is the case. However, even assuming, for the purposes of this petition, that the matter were of constitutional dimension and this Court would be in the position of a court of review, is can be seen that petitioner has presented no ground for a new trial.

CONCLUSION

Petitioner has failed to show that the Court below decided any question so as to deprive him of any federally protected right. Wherefore, the Respondent State of Minnesota respectfully prays that the Court deny the Petition herein.

Respectfully submitted,

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